# Indiana Law Review

Volume 29 No. 2 1995

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# Indiana Law Review

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**Correction:** Please note, the correct title to Professor L. Amede Obiora's Article in Volume 28, Issue 3 is New Wine, Old Skin: (En)Gaging Nationalism, Traditionalism, and Gender Relations.

# Indiana Law Review

**Volume 29** **1995** **Number 2**

# ARTICLES

## REGULATING HATE SPEECH AND THE FIRST AMENDMENT: THE ATTRACTIONS OF, AND OBJECTIONS TO, AN EXPLICIT HARMS-BASED ANALYSIS

RONALD TURNER*

### INTRODUCTION

When, and under what circumstances, is the regulation of "hate speech"[1]

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* Assistant Professor of Law, The University of Alabama School of Law. B.A., *magna cum laude*, 1980, Wilberforce University; J.D., 1984, The University of Pennsylvania Law School. The author thanks Dean Kenneth C. Randall and the University of Alabama Law School Foundation for the generous research support which made this Article possible.

1. As noted by Professor Henry Louis Gates, the term "hate speech" is "ideology in spansule form" and is the

> term-of-art of a movement, most active on college campuses and in liberal municipalities, that has caused many civil rights activists to rethink their allegiance to the First Amendment, the very amendment that licensed the protests, the rallies, the organization and the agitation that galvanized the nation in a recent, bygone era.

Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC 37 (Sept. 20 & 27, 1993). As any definition of hate speech may tend to prejudice the discussion, shape or predetermine the outcome, or utilize terms laden with subjectivity, the reader should consider the following definitions and concepts. *See* Calvin R. Massey, *Hate Speech, Cultural Diversity, And The Foundational Paradigms Of Free Expression*, 40 UCLA L. REV. 103, 105 n.2 (1992). Professor Massey assumes that hate speech

> is any form of speech that produces any of the harms which advocates of suppression ascribe to hate speech: loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim, and effective exclusion from the political arena.

*Id.* In Massey's view, this approach "admits the validity of the harms asserted and takes those harms seriously by making no attempt to distinguish between types of speech that might produce the same harm." *Id.*

Professor Frederick Schauer has defined hate speech as

> utterances intended to and likely to have the effect of inducing others to commit acts and violence or acts of unlawful discrimination based on the race, religion, gender, or sexual orientation of the victim; and . . . utterances addressed to and intended to harm the listener (or viewer) because of her race, religion, gender, or sexual orientation.

Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1349 (1992). For Professor Mari Matsuda, the three characteristics of racist speech are: "1. [t]he message is of racial

constitutional under, or violative of, the First Amendment to the United States Constitution?[2] Those questions, addressed by legal scholars in a slew of recent law review articles,[3] have been the subject of an ongoing "political correctness"[4]

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inferiority; 2. [t]he message is directed against a historically oppressed group; and 3. [t]he message is persecutorial, hateful, and degrading." Mari J. Matsuda, *Public Response To Racist Speech: Considering The Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

Professor Gerald Gunther has described hate speech as "speech expressing hatred or bias toward members of racial, religious, or other groups." GERALD GUNTHER, CONSTITUTIONAL LAW 1134 (12th ed. 1991). According to Professor Rodney Smolla, to use hate speech is to

> attack another because of his or her racial, ethnic, religious, or sexual identity . . . [and] is not to engage in mere dissent against the whole. Such an attack is rather to separate out certain members of the whole and make them targets, degrade them, strip them of their humanity, and set out others against them.

RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 151 (1992) [hereinafter SMOLLA, FREE SPEECH]. *See also* RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 6.01[1], at p. 6-3 (1994) (hate speech is "the generic term that has come to stand for verbal attacks based on race, ethnicity, religion, and sexual orientation or preference"); Nelson v. Streeter, 16 F.3d 145, 149 (7th Cir. 1994) (hate speech codes are "designed to shield groups perceived as vulnerable from offensive, hurtful, and wounding speech").

2. U. S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

3. *See, e.g.*, J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375; Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L. J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Campus Antiracism Rules*]; Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*]; Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L. J. 431 [hereinafter *Racist Speech on Campus*]; Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993) [hereinafter *Hate Speech Paradox*]; Massey, *supra* note 1; Martha Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393 (1990); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist And Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Nadine Strossen, *Regulating Racist Speech On Campus: A Modest Proposal?*, 1990 DUKE L. J. 484; Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197 (1993); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991).

4. *See generally* ARE YOU POLITICALLY CORRECT?: DEBATING AMERICA'S CULTURAL STANDARDS (Francis J. Beckwith & Michael E. Bauman eds., 1993). Some have argued that leftists have attempted "to impose an ideological orthodoxy on students and faculty, under the rubric of 'political correctness.'" *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE

debate between those who believe that hate speech must be protected under the First Amendment, and those who contend that hate speech can be regulated under the First and Fourteenth Amendments.[5]

Among the questions raised in the hate speech debate are the following: Is there an appropriate balance between one person's constitutionally protected speech and another person's constitutionally protected right to "equality"?[6] Does

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SPEECH 197 (1993). Professor Stanley Fish has written that perhaps the most stunning success of neoconservatives "has been the production (in fact a reproduction), packaging, and distribution of the term 'political correctness.'" STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 8 (1994).

> The phrase [political correctness] is a wonderfully concise indictment that says that a group of unscrupulous persons is trying to impose its views on our campus populations rather than upholding views that reflect the biases of no group because they are common to everyone. It is these commonly shared views, we are told, that are really correct, while the views of feminists, multiculturalists, Afrocentrists, and the like are merely politically correct, correct only from the perspective of those who espouse them.

*Id.* Professor Fish argues that political correctness "is not the name of a deviant behavior but of the behavior that everyone necessarily practices." *Id.* at 9. Thus, debates between opposing parties are not "debates between political correctness and something else, but are between competing versions of political correctness." *Id.* *See also* RICHARD A. POSNER, OVERCOMING LAW 7 (1995) (describing political correctness as a "game of faith" in which "the empirical investigation of racial and sexual differences is rejected"); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 406 (1994) (discussing the detractors of political correctness, Professor Delgado states that "[p]olitical correctness is little more than a modern, sanitized, prettified version of an old term. It means one who sympathizes with the Blacks, who takes their point of view").

5. U.S. CONST. amend. XIV, § 1 (no state shall "deny to any person within its jurisdiction the equal protection of the laws").

6. *See* Delgado, *Campus Antiracism Rules*, *supra* note 3, at 344-46; Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1978). The hate speech debate features two camps which see the world differently. The first camp approaches the issue of hate speech regulation as a free speech question.

> If one places speech at the center, a number of things immediately follow. The hate speech rule advocates are placed on the offensive, seen as aggressors attempting to curtail a precious liberty. The burden shifts to them to show that the speech restriction is not content-based, is supported by a compelling interest, is the least restrictive means of promoting that interest, and so on.

Richard Delgado & Jean Stefancic, *Essay I: Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851, 851-52 (1994) [hereinafter Delgado & Stefanic, *Essay I*]. Free speech advocates will be concerned about slippery slopes and the dangerous and censorious administrator who may impose "his or her notion of political orthodoxy on a campus climate that ought to be as free as possible . . . ." *Id.* at 852.

The second group approaches the hate speech issue by placing equality at the center of the controversy and maintains that "free speech advocates [must] show that the hate-speaker's interest in hurling racial invective rises to the requisite level of compellingness. They will insist that this

the First Amendment and the Enlightenment value of freedom of expression[7] protect hate speech from governmental regulation? Do the Fourteenth Amendment and the liberty and equality principles expressed therein provide a constitutional basis for the regulation of hate speech?[8] How should we weigh and

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interest be advanced in the way least damaging to equality, and they, too, will raise line-drawing and slippery slope concerns, but from the opposite direction." *Id.* at 852-53. Placement of either free speech or equality at the center of the hate speech debate is critical to the regulation issue. For instance, if an individual

> places at the center of [her] belief system the notion that all language should be free and that equality must accommodate itself to that regime, then all equality arguments but the most moderate will appear extreme and unjust, constrained as they are by our canonical language. The canon defines the starting point, the baseline from which we decide what other messages, ideas, concepts, and proposals are acceptable. Only moderate messages that effect minor incremental refinements within the current regime pass that test. . . . Reason and argument are apt to prove unavailing; the point of the canon is to define what is a reasoned, just, principled demand. Because hate speech rules fall outside this boundary, if one begins (as we do) with a free speech paradigm, reason fails and the status quo prevails.

*Id.* at 864 (footnote omitted). *See also* Richard Delgado & Jean Stefancic, *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 553 (1995) [hereinafter Delgado & Stefancic, *The Social Construction of* Brown] (the right to say whatever is on one's mind emanates from the First Amendment, and the right to protection from racial insult emanates from the Fourteenth Amendment).

7. *See* JOHN MILTON, THE AREOPAGITICA (Everyman's Library ed. 1927). Of course, Milton's "well-advertised tolerance did not extend to the thought that he hated." LEONARD LEVY, EMERGENCE OF A FREE PRESS 94 (1985). For Milton, Catholics were excluded from the free expression principle:

> I mean not tolerated popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit, that intends not to unlaw itself.

MILTON, *supra*, at 37. *See also* FISH, *supra* note 4, at 103 (after celebrating the virtues of toleration and unregulated publication, Milton "catches himself up short and says, of course I didn't mean Catholics, them we exterminate").

8. *See* Akhil R. Amar, *The Supreme Court, 1991 Term—Comment: The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (discussing the Supreme Court's decision in *R.A.V.* from the doctrinal perspective of the Reconstruction Amendments). A Fourteenth Amendment, equal protection approach to hate speech would provide a cause of action where a state school refused to protect students of color from harassment having analogues to other forms of harassment or torment from which white students were protected. *See* Stephen L. Carter, *Racial Harassment as Discrimination: A Cautious Endorsement of the Anti-Oppression Principle*, 1991 U. CHI. LEGAL F. 13, 14. Instead of focusing on the question of whether certain hate speech is protected by the First Amendment, the Equal Protection question would be whether a public school's failure to prevent or address incidents of hate speech would amount to a violation of the Fourteenth Amendment. *Id.* at 19. Professor Carter, calling for the

integrate the Free Speech and Equal Protection Clauses and the ideal and imperative of equal rights of and for all persons?[9] Why does the United States stand "virtually alone in extending freedom of expression to what has come to be called hate speech"?[10]

Others have addressed the foregoing questions, and I do not rehearse their arguments or analyses here. Rather, I inquire into two significant matters pertaining to the question of the constitutionality of any hate speech regulation: (1) the degree to which some speech, expression, and communicative acts are deemed harmful and are actually regulated in this society; and (2) the harms caused by certain hate speech.[11] I then ask why some harmful speech is regulated, without debate or controversy or cries for First Amendment protection, while hate speech regulation evokes cries of censorship and political correctness and abridgement of

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application of an anti-oppression principle (under which equal protection is interpreted as "directed not against particular racial classifications as such, but against systematic structures of racial oppression, of which racial classifications are essential building blocks"), argues that that principle "would in most instances consider a state's failure to protect its black students as exactly the literal denial of 'equal protection' with which the literature teaches us that those who wrote and ratified the Fourteenth Amendment were most centrally concerned." *Id.* at 22, 41.

9. The tension between the constitutional values of free speech and equality has "divided old allies and revealed unrecognized or unacknowledged differences in the experience, perceptions, and values of members of longstanding alliances. It has also caused considerable soul-searching by individuals with long-time commitments to both the cause of political expression and the cause of racial equality." *Racist Speech on Campus*, *supra* note 3, at 434. Professor Catharine MacKinnon, arguing that the "law of equality and the law of freedom of speech are on a collision course in this country," has written that

> [u]nderstanding that there is a relationship between these two issues--the less speech you have, the more speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from--is virtually nonexistent.

CATHARINE A. MACKINNON, ONLY WORDS 71, 72-73 (1993).

10. Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 739 (1993) (discussing Kevin Boyle, *Overview of a Dilemma*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 1 (Sandra Coliver ed. 1992)).

11. While I principally focus on these two matters, it should be noted that the literature on the hate speech regulation question contains at least three separate approaches. "The civil libertarian approach concludes that suppression of hate speech is generally an impermissible restriction upon the content of speech, except where the speech is directed toward an individual . . . where an immediate breach of the peace is likely." Egalitarians argue that the suppression of hate speech will address and remedy the harm resulting from such speech, and that the harm is usually "sufficiently grave to outweigh the harm resulting from its suppression." Accommodationists generally endorse measures that prohibit "'only targeted vilification of a person on the basis of race, gender, religion, ethnic origin, sexual orientation, or other protected characteristics.'" *See* Massey, *supra* note 1, at 106-07 (quoting Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 213 (1991)).

a "sacred" constitutional right to be a hate-speaker.

The first matter (the degree of the actual regulation of some harmful speech) merits discussion because it is often said that speech is "free"[12] and that government may not regulate speech on the basis of the speaker's viewpoint. Self-described free speech absolutists take the view that, no matter how offensive, speech can never be, and should not be, controlled or regulated. As discussed below, the absolutist position has not been accepted by the courts, and the government does in fact regulate certain speech and even permits viewpoint discrimination in certain circumstances.[13]

As to the second matter (the harms caused by certain hate speech), it is often said that society must tolerate hate speech because the benefits of "free" (non-regulated) hate speech outweigh the harms of hate speech (what I call the "frown or grin but in any event bear it" view). If it is true that hate speech does harm the targets of the communication,[14] then an instance of hate speech may result in some level of harm. When the task of assessing the harms caused by hate speech falls to governmental entities and the courts, judicial rulings on hate speech questions will necessarily be influenced by the judge's or factfinder's assumptions, beliefs, and opinions with respect to the arguments presented concerning the harms of the challenged speech. The actual and potential effects of hate speech assume critical importance and should be the subject of explicit discussion by those who write the laws and rules regulating hate speech as well as the courts engaged in the review of the constitutionality of hate speech regulations.

This Article joins "those who are reluctant to cede the framing of the hate-speech debate to those who have fashioned the so-called pertinent questions since its inception,"[15] and does so from an understanding "that the central meaning of the First Amendment lies not in what we see, but in what we ignore."[16] The

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12. I agree with Professor Larry Alexander that no speech is "free," for "[s]peech and listening are costly activities." Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L. J. 921, 933-34 (1993). In the context of hate speech, speech is surely not "free" for those persons subjected to racist or sexist slurs and epithets. As the targets of hate speech bear the costs of hearing, experiencing, and dealing with such speech, those who argue against regulation effectively require the targets to suffer harms in the name of others' freedoms.

13. *See infra* Part II.

14. "The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech (and free press) protection, and it is a commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm that it may cause." Schauer, *supra* note 1, at 1321. *See also* Balkin, *supra* note 3, at 414 (noting that the right of free speech "includes the government's grant of power to private citizens to harm others through the exercise of their right to speak").

15. Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979, 980-81.

16. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 398 (1989) (book review).

"mechanical jurisprudence and case law laid down in an earlier era will not hold the line much longer,"[17] and many who previously subscribed to First Amendment formalism have now turned to First Amendment realism and urge that "even if First Amendment doctrine permits regulating hate speech, wisdom and good policy counsel against it."[18] Thus, instead of blindly accepting the general view that all speech is "free" in the sense that society must not prohibit or limit it, I start from the observation that certain speech is regularly restricted because society, speaking through the courts, legislatures, and other institutions, has determined that particular harms caused by particular speech can and indeed should be regulated, and can even be prohibited without running afoul of the free speech guarantee.[19] If that observation is correct, we should not quickly rush to the conclusion that hate speech cannot be proscribed on the sole ground that the First Amendment protects and guarantees the freedom of speech. The question we must ask is whether the harms of certain hate speech are such that that speech can be regulated in the same way that other forms and categories of speech have been subjected to constitutional restrictions.[20]

The question examined here is whether hate speech *can be* lawfully and constitutionally regulated because of the harm caused by such speech; whether it *should be* regulated is another matter altogether.[21] The constitutionality of hate speech regulation may be questioned, even if it is concluded that hate speech is harmful. Identification of possible or actual harms requires an assessment of other factors, such as the degree of harm, the specific expression or mode of expression to be regulated, the degree and diminution of dialogue and critique, and the degree of comfort regarding the assurance that the regulators will act appropriately. Thus, a finding of harm does not definitively resolve the constitutional question, but would lead to other critical questions which may better inform constitutional analysis and adjudication.

This Article is divided into the following parts: Part I provides a brief overview of approaches to the First Amendment and looks at the established limitations on government regulation of speech, especially the viewpoint discrimination restriction.[22] Part II discusses selected decisions by the United

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17. Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1809 (1994).

18. *Id.*

19. *See infra* Part II.

20. *See infra* Part III.

21.

> [F]orces, both on the left and the right who oppose hate-speech regulation are beginning to hedge their bets. While they earlier argued that hate-speech rules were flatly unconstitutional, now they are beginning to argue in the alternative: Even if the rules are constitutional, they are a bad idea, and campuses and other institutions should not enact them even if they legally can do so.

Delgado & Yun, *supra* note 17, at 1811-12.

22. *See infra* notes 29-97 and accompanying text.

States Supreme Court that refer to some notion of harm as part of the Court's First Amendment analysis.[23] Part III discusses hate speech and the harms thereof, and asks whether certain harms are sufficient to warrant regulation similar to the regulations deemed permissible and constitutional in other contexts.[24] Part IV discusses the application of a harms-based analysis to hate speech questions, reviews a recent decision by the Supreme Court of Canada in which that court applied a harms-based analysis in upholding certain laws restricting hate speech,[25] considers objections to and obstacles facing the adoption of the harms-based rationale by the courts, and concludes that, with the exception of assaultive speech directed to specific targets in a face-to-face and confrontational manner, a harms-based approach to and analysis of hate speech presents many problems that may render that approach unworkable.[26] Part V then turns to the issue of the regulation of hate speech in the specific context of colleges and universities.[27] This Article concludes with observations on the role of injury and harm in the hate speech debate, with proponents arguing that hate speech causes real injury to the targets of the speech, and opponents dismissing the claimed injuries as "merely dignitary, and not a real harm."[28]

## I. FREE(?) SPEECH

### *A. Approaches To The First Amendment*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[29] A "safeguard against governmental suppression of points of view with respect to public affairs,"[30] the First Amendment generally prevents the government from proscribing speech or expressive conduct because of the government's disapproval of the ideas expressed.[31] Thus, governmental regulation or prohibition of speech, "on the sole ground that some or many in the audience find what is said or written offensive, abridge[s] essential free speech interests."[32]

"[F]ree speech values are plural and diverse rather than unitary."[33] Scholars

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23. *See infra* notes 98-238 and accompanying text.

24. *See infra* notes 239-299 and accompanying text.

25. *See* Regina v. Keegstra, 3 S.C.R. 697 (Can. 1990), discussed *infra* at notes 320-59 and accompanying text.

26. *See infra* notes 378-430 and accompanying text.

27. *See infra* notes 431-505 and accompanying text.

28. Delgado & Stefancic, *The Social Construction of* Brown, *supra* note 6, at 553.

29. U.S. CONST. amend. I.

30. Cass R. Sunstein, *Neutrality In Constitutional Law (With Special Reference To Pornography, Abortion, And Surrogacy)*, 92 COLUM. L. REV. 1, 22 (1992) (footnote omitted).

31. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Texas v. Johnson, 491 U.S. 397, 401 (1989).

32. DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 171 (1986).

33. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 831

have spilled much ink trying to "identify a single value animating the protection of free speech like democracy, self-realization, [and] autonomy."[34] "But it would be most surprising if free speech were connected with any single value. This is true for most constitutional rights, which serve a range of purposes."[35] Given the plural speech values, it can be anticipated that "free speech doctrine is not particularly principled in any natural sense. The Court has created an array of doctrinal boxes for speech issues, and determines the result by picking the box. Some boxes protect speech strongly, others do not."[36]

One recurring debate in First Amendment jurisprudence involves three questions: (1) whether the First Amendment is an absolute; (2) whether the competing interests of the speaker and the government should be balanced; and (3) whether a categorization approach to the free speech question is preferable.[37] Absolutists take the view that the First Amendment's declaration that "Congress shall make no law . . . abridging the freedom of speech" means just that: "Congress shall make NO LAW abridging speech."[38] Justice Hugo Black counseled that the language of the First Amendment meant literally that Congress could not make any law abridging speech "without any 'ifs' 'buts' or 'whereases.'"[39] Justice Black believed that "the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing'

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(1994).

34. *Id.* *See also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Turner, *supra* note 3.

35. Sunstein, *supra* note 33, at 831 (footnote omitted). *See also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

36. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1019 (1993).

37. GUNTHER, *supra* note 1, at 1004-07.

38. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 13 (1990). *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 42-43 (1991). There are at least two types of absolutism. The first, absolute absolutism, maintains that there are no permissible restraints or penalties on speech. *See* SMOLLA, FREE SPEECH, *supra* note 1, at 23. Under the second category of absolutism, qualified absolutism, the "freedom of speech" is absolutely protected but is defined more narrowly such that government has some room to maneuver in regulating certain forms of communications. *Id.* at 23-24.

Absolutists claim, *inter alia*, with few or no exceptions: that any effort to regulate speech threatens the principle of free expression; that the First Amendment embodies a conception of neutrality among different points of view, forbidding governmental line-drawing between speech that it likes and speech that it does not like; that the free speech principle is not limited to political speech; that any restrictions on speech may expand and result in other restrictions and acts of censorship; and that balancing should play no role in First Amendment law. SUNSTEIN, *supra* note 4, at 5-7.

39. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

that was to be done . . . ."[40] Another jurist, Justice William Douglas, was of the view that the "ban of 'no' law" that abridges First Amendment rights is "total and complete."[41] It should be noted, however, that the absolutist view has been rejected by the Supreme Court,[42] and it is now "an entrenched feature of first amendment doctrine that the coverage of the first amendment does not extend to all linguistically communicative acts."[43] "First Amendment absolutism has never entailed absolute devotion to free expression; the question has always been where to draw the line."[44]

The balancing theory posits that in the event of a "conflict between speech and other social values, the weight of the speech interest is balanced against the weight of the competing interest" in the particular case before the court.[45] "Where First Amendment rights are asserted . . . resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[46] In one Supreme Court decision, Justice Felix Frankfurter stated:

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[47]

Critics of the balancing approach argue that balancing is too deferential to governmental views and judgments and provides inadequate guidance to decisionmakers,[48] leads to uncertainty, and fails to insulate the judiciary from the

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40. Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting). For a discussion of Justice Black's First Amendment views, see ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

41. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 156 (1973) (Douglas, J., concurring).

42. *Konigsberg*, 366 U.S. at 49.

43. Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 562 (1989).

44. Henry Louis Gates, Jr., *Truth or Consequences: Putting Limits on Limits*, ACADEME, Jan.-Feb. 1994, at 14.

45. SMOLLA, FREE SPEECH, *supra* note 1, at 39. There are at least two types of balancing—ad hoc balancing and definitional balancing. Under ad hoc balancing, speech cases are to be decided by considering the particular circumstances in specific cases. Under definitional balancing, courts are not to define free speech by resort to absolutism or by focusing on the circumstances of an individual case; rather, courts must assess the competing interests in the general run of cases and formulate rules covering those cases. *See* SMOLLA & NIMMER, *supra* note 1, § 2.07, at p. 2-61; SHIFFRIN, *supra* note 38, at 14. The balancing referred to in the text is ad hoc balancing.

46. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

47. Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring).

48. GUNTHER, *supra* note 1, at 1006.

passions of the public.[49]

The third approach, known as categorization, sets out bright line rules that distinguish speech within the protection of the First Amendment from speech outside the protection of the Amendment.[50] Thus, the category of political speech is protected[51] and other categories of speech, such as fighting words[52] and obscenity,[53] are not protected. Categorization may be acceptable, or at least more acceptable, when it rests upon adequate explanations of why a particular category is protected or unprotected, but categorization is also subject to the criticism that it consists largely of conclusory statements, covert balancing, and overgeneralizations.[54]

Although application of the differing categories of absolutism, balancing, and categorization in hate speech cases is beyond the scope of this Article, it is worth noting that under the pure absolutist view, the government could not lawfully regulate hate speech or any other speech. Under a balancing test, courts would weigh the free speech interest (in that instance, the asserted "right" of the hate speaker) against the weight of the competing interest (such as preservation of the peace) or equality value. Under a categorization approach, the question would be whether hate speech fell within the protection of the First Amendment or whether some defined hate speech category was an unprotected class of speech like fighting words or obscenity.

Once the pure absolutist approach is rejected, the axiom that speech is "free," meaning that the speech cannot be lawfully regulated by law, is not a sufficiently accurate statement of the law. Indeed, there are many exceptions to the protection of the First Amendment.[55] One cannot legally infringe another individual's

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49. SMOLLA & NIMMER, *supra* note 1, § 2.07, at p. 2-61. Professor Kent Greenawalt has argued that when ad hoc balancing includes substantial deference to the legislature, "it is subject to the fatal objection that its practical bite is almost as slight as that of the rational-basis test. If the ultimate criterion is whether the legislature might reasonably have balanced the factors as it did, only rarely will a court give a negative answer." KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 222 (1989).

50. GUNTHER, *supra* note 1, at 1007; Frederick Schauer, *Codifying The First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 302.

51. Political speech, considered by many to be high value speech, has received special First Amendment protection. One critique of this valuation of political speech posits that in light of the "power that judges and politicians have to affect the content of legal norms, it is plausible to interpret the special protection political speech has received in the past as the result of judicial bias toward the importance of public life." Alon Harel, *Free Speech Revisionism: Doctrinal and Philosophical Challenges*, 74 B.U. L. REV. 687, 692 (1994) (book review). *See also* R. H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974) (those who are protected by the protection of political speech play a key role in fashioning that protection).

52. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

53. Miller v. California, 413 U.S. 15 (1973).

54. GUNTHER, *supra* note 1, at 1007.

55. *See generally* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991); Schauer,

copyright or trademark.[56] One cannot use the First Amendment as a shield to allow the formation of an unlawful conspiracy,[57] lie while under oath,[58] disclose official state secrets,[59] engage in expression that breaches the peace,[60] make certain comments as a lawyer on pending cases,[61] state that a judge is a "buffoon" or "probably one of the worst judges in the United States,"[62] or make harassing telephone calls.[63] Thus, to argue that the First Amendment is a "seamless web" ignores the large number of exceptions that come into play, especially where the interests of powerful individuals or groups are at issue.[64]

If exceptions to First Amendment protection are so prevalent, why is the suggestion that certain hate speech regulations do not violate the First Amendment met with consternation?[65] In light of the foregoing, it is more accurate to say that

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*supra* note 43 (discussing the many acts of "speech" that remain untouched by the coverage of the First Amendment); *infra* notes 84-96 and accompanying text.

56. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

57. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

58. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1286 (1992).

59. Snepp v. United States, 444 U.S. 507 (1980).

60. Schenck v. United States, 249 U.S. 47 (1919).

61. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

62. *See* Richard Reuben, *Lawyer's License at Risk*, A.B.A. J., March 1994, at 31. A Los Angeles lawyer made these statements about a federal judge in the United States District Court for the Central District of California. The judge in question referred the matter to the chief judge of the Central District of California, who referred the matter to the district's Standing Committee on Discipline. *Id.*

63. *See, e.g.*, State v. Gattis, 730 P.2d 497 (N.M. Ct. App. 1986). *But see* People v. Klick, 362 N.E.2d 329 (Ill. 1977) (state telephone harassment law was unconstitutionally overbroad). For a discussion of the First Amendment and telephone harassment, see Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL OF RTS. J. 179, 192-206 (1994).

64. Delgado, *supra* note 4, at 392.

> The wealthy and powerful are considered to have a kind of property interest in their reputation, so speech that damages them is compensable even though words are the sole means of causing the harm. And the same is true for words that violate a copyright, communicate a threat, form a monopoly, or constitute misleading advertising. Disrespectful words uttered to a judge, teacher, police officer, or other authority figure are also punishable, as are untruthful words uttered under oath or words that disseminate an official secret. Each of these exceptions or special doctrines exists to promote the interests of a powerful group such as the military or consumers.

*Id.* at 392-93 (footnotes omitted).

65. Delgado & Stefancic, *supra* note 58, at 1286. On that point, Delgado and Stefancic state:

> Yet the suggestion that we create new exception [sic] to protect lowly and vulnerable members of our society, such as isolated, young black undergraduates attending

speech can be regulated in certain circumstances, such as when the weight of a competing interest or value is deemed to outweigh the asserted speech interest, or where the speech at issue falls within a recognized unprotected category. Thus, it is not enough to say that hate speech is protected expression simply because it is speech, or that any efforts to regulate hate speech are per se unconstitutional, for the analysis cannot begin and end with mere labeling or categorization. Important questions must be posed and significant arguments must be made and considered before it can be concluded that a particular hate speech regulation is or is not constitutional.

### *B. Restrictions*

When can speech be regulated consistent with the First Amendment? As noted by Justice John Paul Stevens, the term "the freedom of speech" could not be "co-extensive with the category of oral communications that are commonly described as 'speech' in ordinary usage."[66] Thus, the "Framers did not intend to provide constitutional protection for false testimony . . . or conspiracies among competitors to fix prices. The Amendment has never been understood to protect all oral communication, no matter how unlawful, threatening, or vulgar it may be."[67] Tested in the "crucible of litigation,"

> it is now settled that constitutionally protected forms of communication include parades, dances, artistic expression, picketing, wearing arm bands, burning flags and crosses, commercial advertising, charitable solicitation, rock music, some libelous false statements, and perhaps even sleeping in a public park.[68]

Thus, some speech and expression can be constitutionally regulated, and some speech and expression is constitutionally protected. How do we distinguish the former from the latter? What methodologies are used by the courts in determining whether certain speech falls within or outside the protection of the First Amendment?

There are at least three specific and recognized restrictions on speech: content-neutral restrictions, content-based restrictions, and viewpoint-based restrictions.[69] Where restrictions are content-neutral, communications are

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> dominantly white campuses, is often met with consternation: the First Amendment must be a seamless web; minorities, if they knew their own self-interest, should appreciate this even more than others. This one-sidedness of free-speech doctrine makes the First Amendment much more valuable to the majority than to the minority.

*Id.* (footnote omitted).

66. John Paul Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1296 (1993).

67. *Id.*

68. *Id.* at 1298 (footnotes omitted).

69. *See* SUNSTEIN, *supra* note 4, at 11-14; Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 796 (1993) [hereinafter *Words, Conduct, Caste*]. One scholar has criticized this tripartite system:

restricted without regard to the message conveyed.[70] For example, a government ban on billboards or a law forbidding all advertising on subways would be content-neutral because all communications or messages (whether Republican or Democrat, liberal or conservative, etc.) are treated the same; the ban does not turn on and is not affected by the content of the speech, and the restriction applies across the board to all speakers affected by the restriction.[71] "Content-neutral restrictions are evaluated through a balancing test, one that looks at the extent of the harm, the existence of alternative outlets, the availability of less restrictive means of regulation," and other factors.[72]

Content-based (and viewpoint neutral) restrictions limit communications because of the message conveyed, and are presumed unconstitutional and are permitted in limited circumstances.[73] For instance, the content of the speech is critical when government bans political speech in a certain place or implements a rule stating that persons may not discuss baseball or politics or matters involving race, for "we . . . have to know what the speech is in order to know whether it is regulated."[74] Restriction of speech on the basis of content carries with it the very real risk that government may prefer some communications and messages over others. Given that risk, the government's "action will be subjected to a more stringent standard than when it treats all messages equally, say by banning all billboards."[75]

However, the Supreme Court routinely departs from the general rule against

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> Sometimes the tripartite system is more than just redundant; it can in fact be damaging. It allows mechanical resolution of cases and consequent lack of attention to important conflicts between societal values and interests. Instead of engaging in a substantive debate about the proper degree of shielding from potentially disruptive materials, such as those with erotic content or a racist message, Sunstein (and others) have suggested that such restrictions are invalid simply because they are content-based or viewpoint-based. Sunstein concedes that there are cases in which viewpoint-based or content-based restrictions are proper, but he believes that they must carry a presumption of invalidity because he fears that such restrictions generally flow from hidden and illegitimate government motives.

Harel, *supra* note 51, at 702-03 (footnotes omitted).

70. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

71. SUNSTEIN, *supra* note 4, at 11.

72. *Words, Conduct, Caste*, *supra* note 69, at 796.

73. *Id.*

74. SUNSTEIN, *supra* note 4, at 12.

75. GREENAWALT, *supra* note 49, at 225. For an interesting discussion of the Supreme Court's strict scrutiny analysis and content-based speech restrictions, see Eugene Volokh, *Freedom of Speech Beyond Strict Scrutiny*, U. PA. L. REV. (forthcoming).

content regulation.[76] For example, the Court has held that an election-day, content-based ban on political speech within one hundred feet of a polling place did not violate the First Amendment.[77] The Court upheld a federal regulation prohibiting employees of federally funded family planning clinics from discussing abortion with pregnant women.[78] In addition, public colleges and universities routinely make, indeed must make, content-based distinctions in formulating and carrying out their educational missions.[79]

As to viewpoint-based restrictions,[80] the government "makes the point of view of the speaker central to its decision to impose, or not to impose, some penalty."[81] As noted by Professor Cass Sunstein:

> The government might, for example, ban anyone from criticizing a war, or from favoring homosexuality, or from speaking against the incumbent President, or from arguing on behalf of affirmative action programs. Here the government is trying to protect a preferred side in a debate and to ban the side that it dislikes. A viewpoint-based restriction is distinctive in the sense that it comes into effect only when a particular viewpoint is expressed. We know that we are dealing with a viewpoint-based restriction if and only if the government has silenced one side in a debate.[82]

Government discrimination on the basis of viewpoint can skew the public debate on a particular issue by restricting the ability of one party to communicate its message, with such discrimination often arising from governmental hostility to certain ideas or other illegitimate governmental justifications.[83]

If asked the general question whether government may regulate speech on the basis of the viewpoint of the speaker, most respondents would answer in the negative. Although that answer would be correct in certain instances, it would be incorrect in many others. Some acts characterized as "speech" in ordinary

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76. Stevens, *supra* note 66, at 1304.

77. Burson v. Freeman, 504 U.S. 191 (1992).

78. Rust v. Sullivan, 500 U.S. 173 (1991); Stevens, *supra* note 66, at 1304.

79. *See infra* Part III.

80. Viewpoint-based restrictions are a subset of content-based restrictions.

> All viewpoint-based restrictions are, by definition, content-based; government cannot silence one side in a debate without making content crucial. But not all content-based restrictions are viewpoint-based. The key difference between a content-based and a viewpoint-based restriction is that the former need not make the restriction depend on the speaker's point of view.

SUNSTEIN, *supra* note 4, at 12. *See also* Stevens, *supra* note 66, at 1309 ("[C]ontent discrimination is not the same as viewpoint discrimination.").

81. SUNSTEIN, *supra* note 4, at 12.

82. *Id.*

83. *See* Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 881 (1993).

language are not protected by the First Amendment,[84] and the Supreme Court has validated laws incorporating viewpoint preferences by ignoring obvious forms of such preferences.[85] Thus, viewpoint discrimination in the area of commercial speech has been deemed lawful in certain contexts. For example, the government lawfully bans the promotion of casino gambling[86] even though it allows advertising opposing casino gambling. The government prohibits television advertising promoting cigarette smoking but does not forbid television advertising opposing smoking.[87] "[T]he opinion that cigarette smoking is harmful is a viewpoint, just as is the opinion that people ought to smoke" is a viewpoint.[88] The government may choose to regulate airline advertising[89] but not bus advertising. And it may lawfully monitor solicitation by lawyers[90] even though it does not monitor solicitation by doctors.

The National Labor Relations Board restricts certain statements by employers and unions where the statements violate the National Labor Relations Act[91] and prohibits coercion and threats against employees during the "critical period" preceding NLRB-conducted representation elections.[92] The Securities and Exchange Commission restricts the statements that may be made by the sellers of securities and "imposes old-fashioned prior restraints, requiring government preclearance before speech may reach the public."[93] The Federal Communications

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84. As noted by Professor Frederick Schauer:

> [A] criminal defendant charged with participation in a bank robbery by virtue of having communicated the combination of the bank's safe to the person who in fact opened the safe benefits from no special presumptions or tests because the participation was linguistically communicative. The defendant in a Sherman Act price-fixing case whose sole activity consists of transmitting to a competitor the prices her company is about to charge is treated the same way as any other antitrust defendant despite the fact that her activities were restricted to speech used for the purpose of communicating information. The securities laws engage in wholesale regulation of what can be said, how it can be said, and when it can be said, and do so (except when a newspaper or magazine is involved) totally outside of the purview of the first amendment. The same can be said for laws regulating labor relations, in particular laws controlling both picketing and the conduct of elections. To lie under oath violates the law even if the lie told turns out to cause no harm whatsoever in the particular case, a result unexplainable if courtroom testimony under oath were an activity covered by the first amendment.

Schauer, *supra* note 43, at 563 (footnotes omitted).

85. Kagan, *supra* note 83, at 875-76.

86. Posados de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).

87. *See* 15 U.S.C. § 1335 (1994).

88. Schauer, *supra* note 43, at 566.

89. Morales v. Trans World Airlines, 504 U.S. 374 (1992).

90. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

91. 29 U.S.C. §§ 151-69 (1994).

92. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

93. SUNSTEIN, *supra* note 4, at 33. *See generally* NICHOLAS WOLFSON, CORPORATE FIRST

Commission regulates broadcasting under a "public interest" standard.[94] Government employment contracts with former employees who held security clearances may constitutionally prohibit the former employees from publishing certain subjects without a prepublication review because of a perceived danger to national interests.[95] Thus, viewpoint discrimination is often permitted and is an established and common part of the legal landscape.[96]

In the face of the widely held perception that viewpoint discrimination is generally unconstitutional, why have some forms of viewpoint discrimination been accepted and gone unchallenged? One answer may be that the "presence of real-world harms obscures the existence of selectivity."[97] Because the desired ends—including the prevention of the harms of smoking, gambling, fraudulent or misleading commercial speech, threats to employees attempting to exercise their statutory right to unionize, untrue or misleading proxy statements, etc.—may be uncontroversial and accepted as mainstream propositions, the means of accomplishing those ends are not considered to be problematic from a First Amendment perspective.

## II. HARMFUL SPEECH AND THE FIRST AMENDMENT

Salient exceptions to the First Amendment "all involve the concrete prospect of significant—and involuntary—exposure to harm."[98] There are abundant examples of Supreme Court discussions of harm in First Amendment cases. In *Chaplinsky v. New Hampshire*,[99] the Court affirmed the conviction of Walter Chaplinsky who said to a police officer, "[y]ou are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[100] The Court held that the statute under which Chaplinsky was charged did not violate the First Amendment.[101] The Court opined that "it is well understood that the right of free speech is not absolute at all times and under all

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AMENDMENT RIGHTS AND THE SEC (1990).

94. SUNSTEIN, *supra* note 4, at 33.

95. Snepp v. United States, 444 U.S. 507, 511-12 (1980).

96. *But see* Danny J. Boggs, *A Differing View on Viewpoint Discrimination*, 1993 U. CHI. LEGAL F. 45.

97. Sunstein, *supra* note 30, at 30.

98. Gates, *supra* note 44, at 14.

99. 315 U.S. 568 (1942).

100. *Id.* at 569.

101. *Id.*

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

*Id.* (citing Chapter 378, Section 2 of the Public Laws of New Hampshire).

circumstances."[102]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[103]

In the Court's view, the New Hampshire statute was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[104] "Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[105]

The *Chaplinsky* Court identified several harms in its discussion of the New Hampshire statute and the First Amendment. Certain speech may be constitutionally regulated in order to prevent harm to "the social interest in order and morality."[106] The state may act to prevent the harms of a breach of the peace, fighting, violence, retaliation, and the infliction of injury to the addressee of fighting words. Regulation of such words to prevent those harms was not unconstitutional, the Court said, and Walter Chaplinsky was lawfully prosecuted by the state for making the above-quoted statements.

In 1949, the Court decided *Terminiello v. City of Chicago*.[107] Arthur

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102. *Id.* at 571.

103. *Id.* at 571-72 (footnotes omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)). The Court quoted the New Hampshire Supreme Court's opinion in *Chaplinsky*:

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . . Such words, as ordinary men know, are likely to cause a fight. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including "classical fighting words", words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

*Id.* at 573.

104. *Id.*

105. *Id.* at 574.

106. *Id.* at 572.

107. 337 U.S. 1 (1949).

Terminiello, a suspended priest, was found guilty of disorderly conduct in violation of a Chicago, Illinois ordinance and was fined.[108] Terminiello gave an address in a Chicago auditorium. Outside the auditorium were one thousand persons protesting the meeting. During his address, Terminiello condemned the protesters and, in the Court's words, he "vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."[109] The city charged Terminiello with violating the aforementioned ordinance. At trial, the judge

> charged that "breach of the peace" consists of any "misbehavior which violates the public peace and decorum"; and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[110]

The Court observed that:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[111]

The Court concluded that the city ordinance, "as construed by the trial court seriously invaded this province."[112] Terminiello was convicted because his "speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not

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108. *Id.* at 2. The ordinance provided:

> All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.

*Id.* (alteration in original).

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 4-5 (emphasis added) (citations omitted).

112. *Id.* at 5.

stand."[113] Thus, in the absence of harm, in that case, a "clear and present danger of a serious substantive evil,"[114] the city had abridged Terminiello's First Amendment rights.

In *Feiner v. New York*,[115] a soap box speaker was arrested and convicted for refusing to obey a police order to stop making a speech in which he called the mayor of Syracuse, New York a "champagne-sipping bum" and the American Legion a "Nazi Gestapo," and said, in the face of a hostile crowd, that "negroes . . . should rise up in arms and fight for their rights . . . ."[116] Upholding the conviction, the Court reasoned that the arrest was the "means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order."[117] The Court stated that the speaker was not arrested nor convicted for the making or content of the speech. Rather, the sole motivation of the police in making the arrest was a "proper concern for the preservation of order and protection of the general welfare . . . ."[118]

*Beauharnais v. Illinois*[119] involved a Chicago, Illinois ordinance that made it a crime to publicly display any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" and "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[120] Beauharnais, the president of the White Circle League, passed out bundles of lithographs on the streets of downtown Chicago "calling on the Mayor and the City Council of Chicago 'to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . .'"[121] The lithograph also stated that, "'[i]f persuasion and the need to prevent the white race from being mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[122] Beauharnais was convicted of violating the ordinance and was fined two hundred dollars.[123]

The precise question before the Court was "whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing . . . libels . . . directed at designated collectivities and flagrantly disseminated."[124] The Court, in an opinion by Justice Frankfurter, stated:

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113. *Id.*
114. *Id.* at 4.
115. 340 U.S. 315 (1951).
116. *Id.* at 330.
117. *Id.* at 321.
118. *Id.* at 319.
119. 343 U.S. 250 (1952).
120. *Id.* at 251 (citing Section 224a, Illinois Criminal Code, ILL. REV. STAT., 1949, c. 38, Div. 1, Section 471).
121. *Id.* at 252.
122. *Id.*
123. *Id.* at 251.
124. *Id.* at 258.

> Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.[125]

Illinois had been the scene of "exacerbated tension between races, often flaring into violence and destruction."[126] Utterances of the type before the Court in *Beauharnis* had played a significant part in many of the outbreaks, as Illinois attempted to "assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups--foreign-born brought to it by the crest of the great wave of immigration, and Negroes attracted by jobs in war plants and the allurements of northern claims."[127] In addition, the first northern race riot, which occurred in Springfield, Illinois, had resulted in the loss of life; rioting had taken place in East St. Louis, Illinois, and there had been a race riot in Chicago in the summer of 1919.[128]

> In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.[129]

Justice Frankfurter noted that it could be argued that the ordinance would not help matters, and "that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings."[130] He answered that argument as follows:

> Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social

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125. *Id.* at 258-59 (footnote omitted).
126. *Id.* at 259.
127. *Id.* at 259-60.
128. *Id.* at 260-61 (footnote omitted).
129. *Id.* at 261.
130. *Id.* at 261-62.

issues.[131]

In addition, Frankfurter concluded that it would be "arrant dogmatism" for the Court to deny that Illinois "may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[132] Thus, "we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."[133] Conceding that the choice of the Illinois legislature could be abused,[134] the Court reasoned that "[e]very power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law."[135] Finding no warrant in the Constitution for denying Illinois the power to pass the law under attack, Frankfurter noted:

> [I]t bears repeating--although it should not--that our findings that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.[136]

Again, the notion of harms, both real and conceivable, played a role in the Court's analysis. In holding that the ordinance was constitutional, the *Beauharnais* Court noted that the purveyance of falsehood concerning racial and religious groups promoted strife; that utterances like those at issue before the Court had resulted in exacerbated tensions between races; and that violence, destruction, and race riots had occurred in Illinois. Faced with those harms and disruptions, the state could constitutionally prohibit the lithograph distributed by Beauharnais in order to promote the peace and well-being of the state and its inhabitants. While it is generally understood that *Beauharnais* is no longer good law in light of *New York Times v. Sullivan*,[137] the Court's recognition of the harms

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131. *Id.* at 262.

132. *Id.* at 263.

133. *Id.*

134. The arguments were made that the law could be discriminatorily enforced, and that prohibiting libel of a racial group or creed was "but a step from prohibiting libel of a political party." *Id.*

135. *Id.*

136. *Id.* at 267.

137. 376 U.S. 254 (1964). The *New York Times* Court held that a public official could not maintain a libel action unless the public official could show that the alleged libeller had "actual malice," more specifically, could show that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The Court "has not had occasion to answer the precise question whether prohibitions on group libel might be

identified by the state illustrate the point that a harms-based analysis is not foreign to First Amendment analysis.

The Court in *Miller v. California*[138] stated that, "obscene material is unprotected by the First Amendment."[139] Recognizing that the states have a legitimate interest in prohibiting the dissemination or exhibition of obscene materials,[140] and acknowledging the inherent dangers of undertaking to regulate any form of expression, the Court set out the following guidelines for the trier of fact in cases involving obscenity and the First Amendment: (1) "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;"[141] (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;"[142] and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[143]

In another case decided the same day as *Miller*, the Court's articulated rationale for proscribing obscenity referred to the need of "protect[ing] 'the social interest in . . . morality'" and the need to "maintain a decent society."[144] The "current standard for identifying obscenity was justified in part by reference to real-world harms,"[145] and the Court openly looked to and made findings with respect to the average person's and the community's views of expression, the offensive nature of the expression, and the "value" of the expression.[146] Thus, in the case of obscenity, society has determined that such material has little or no value, and is harm-causing because it can or does cause antisocial conduct, corruption of character, erosion of moral standards, and degradation of preferred

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acceptable in the wake of *New York Times v. Sullivan*. But most people think that bans on group libel or hate speech, broadly defined, are no longer permissible." SUNSTEIN, *supra* note 4, at 186.

138. 413 U.S. 15, 23 (1973).

139. *Id.*

140. The Court turned to the dictionary to define obscenity. Obscene material is "disgusting to the senses," is "grossly repugnant to the generally accepted notions of what is appropriate," is "offensive or revolting as countering or violating some ideal or principle," and is "disgusting, repulsive, filthy, foul, abominable, loathsome." *Id.* at 18 n.2.

141. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

142. *Id.*

143. *Id.*

144. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-61 (1973). *Slaton* also spoke of the correlation between obscene materials and sex crimes. *Id.* at 58-59. As noted by Professor Elena Kagan, "[t]his concern too may reflect a notion of morality, but if so, it is a morality rooted in material harms." Kagan, *supra* note 83, at 894.

145. Kagan, *supra* note 83, at 893.

146. Apply this analysis to hate speech. Can the average person and the community determine that certain hate speech does not meet the standards of that community and therefore is not protected by the First Amendment? Can certain hate speech be regulated where it is deemed to be patently offensive? Can certain hate speech be regulated where it is determined that the speech has no political, scientific, literary, or artistic value? If it is constitutionally permissible to regulate obscene materials, is it also constitutional to regulate certain hate speech? If not, why not?

values.[147]

In *City of Renton v. Playtime Theatres, Inc.*,[148] the Court held that a city ordinance, which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, was constitutional. Writing for the Court, Justice Rehnquist opined that the city ordinance was aimed not "at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community."[149] The ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'. . . ."[150] Thus, Rehnquist stated, the ordinance was completely consistent with the Court's definition of content-neutral speech regulations and did not contravene the principle underlying the Court's concern about "'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'"[151] As to the method chosen by the city to further its substantial interests, the Court determined that "'[i]t is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'"[152] Moreover, the ordinance was valid because it was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . . ."[153]

Can the *Renton* Court's holding that the government can regulate speech if it does so because of the untoward secondary effects of the speech rather than because of the Court's disapproval of the content of the speech be applied to hate speech? If the primary-secondary dichotomy is in the eye of the judiciary only,[154] and if it is true that it is the content of speech that determines the effects, "a strong argument can be made that the prohibition is in actuality content-based."[155] Can

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147. Sheldon H. Nahmod, *Adam, Eve and the First Amendment: Some Thoughts on the Obscene as Sacred*, 68 CHI.-KENT L. REV. 377, 377-78 (1992).

148. 475 U.S. 41 (1986).

149. *Id.* at 47.

150. *Id.* at 48 (alterations in original).

151. *Id.* at 48-49 (quoting Police Dept. v. Mosley, 408 U.S. 92, 96 (1972)).

152. *Id.* at 52 (alterations in original) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion)).

153. *Id.*

154. Stephen Reinhardt, *The First Amendment: The Supreme Court and the Left—With Friends Like These*, 44 HASTINGS L. J. 809, 819 (1993). Judge Reinhardt notes that one major problem with the *Renton* doctrine is the risk of misapplication. "Even assuming that one could justify, intellectually, a regulation of speech based on secondary as opposed to primary effects, the state legislatures and city councils that implement the doctrine are often neither sophisticated in its use nor particularly concerned abut [sic] First Amendment niceties." *Id.*

155. *Id.*

it not be argued, then, that certain hate speech is regulable because of the adverse effects and consequences of such speech, and that such regulation is not unconstitutional solely on the ground that the regulation looks at the content of the speech? Like constitutional and content-based regulation of the secondary effects of other speech, cannot the secondary effects of certain hate speech be lawfully and constitutionally regulated? If one answers this question in the negative, what distinguishes some secondary effects from others for First Amendment purposes? Is the distinction based on the valuations of the different expressions and the harms thereof? Is it fair to say that the distinction is really a reflection of "substantive disagreements over matters of policy?"[156]

In *Texas v. Johnson*,[157] the flag burning case, the Court considered two interests offered by the State of Texas attempting to justify the conviction of Gregory Johnson for burning an American flag. The state claimed that its interest in preventing breaches of the peace justified Johnson's conviction for flag desecration. "However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag."[158] The Court reasoned that acceptance of the state's argument that Johnson's conduct created the potential for a breach of the peace as a justification for the conviction would eviscerate the Court's holding in *Brandenburg v. Ohio*.[159] "This we decline to do."[160] Johnson's expressive conduct did not fall within the proscribed class of fighting words. Justice Brennan wrote: "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[161]

The State of Texas also urged that its interest in preserving the flag as a symbol of nationhood and national unity justified Johnson's conviction. Justice Brennan stated that Johnson was prosecuted because he knew that his expressive conduct would cause serious offense. "The Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."[162] The Court disagreed with the state's argument that the message conveyed by flag desecration was a harmful one and therefore could be prohibited.[163] Noting the "bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself

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156. *Id.* at 820.

157. 491 U.S. 397 (1989).

158. *Id.* at 408.

159. 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Court held that a state could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

160. *Texas*, 491 U.S. at 409.

161. *Id.*

162. *Id.* at 411.

163. *Id.* at 413.

offensive or disagreeable,"[164] Justice Brennan concluded that nothing in the Court's precedents suggested that a state could "foster its own view of the flag by prohibiting expressive conduct relating to it."[165]

Chief Justice Rehnquist, dissenting, disagreed with both the Court's analysis and result. "No other American symbol has been as universally honored as the flag."[166] "The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[167] After noting and quoting from the *Chaplinsky* "fighting words" decision,[168] Rehnquist opined that the public burning of the flag by Johnson was not an essential part of any exposition of ideas, and had a tendency to incite a breach of the peace. The flag burning,

> like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace.[169]

For Rehnquist, "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others."[170] One of the "high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning."[171]

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164. *Id.* at 414.

165. *Id.* at 415.

166. *Id.* at 427 (Rehnquist, C. J., dissenting, joined by Justices White and O'Connor).

167. *Id.* at 429.

168. *See supra* notes 99-106 and accompanying text.

169. *Texas*, 491 U.S. at 431 (alteration in original).

170. *Id.* at 432.

171. *Id.* at 435. In a separate dissent, Justice Stevens argued that the "concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense." *Id.* at 438 (Stevens, J., dissenting). Thus, "one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others . . . [would] . . . be seriously offended." *Id.* Even if the actor knew that all possible witnesses would understand that he intended to send a message of respect, Justice Stevens stated, the flag burner could still be guilty of desecration if he also knew that that understanding did not lessen the offense taken by some of the witnesses. *Id.* Accordingly, Stevens concluded that the case had nothing to do with disagreeable ideas, but rather involved disagreeable conduct that diminished the value of an important national asset. If Johnson had chosen to spray paint his message on the facade of the Lincoln Memorial, "there would be no question about the power of the Government to prohibit his means of expression." *Id.*

One year after the decision in *Johnson*, the Court in United States v. Eichman, 496 U.S.

*Barnes v. Glen Theatre, Inc.*[172] involved the claim that the First Amendment prohibited the State of Indiana from enforcing its public indecency law to prevent totally nude dancing.[173] In rejecting the claim and applying *United States v. O'Brien*,[174] a plurality of the Court concluded that the statute was justified despite its incidental limitations on some expressive activity, that the "statute's purpose of protecting societal order and morality is clear from its text and history,"[175] and that the law "furthers a substantial government interest in protecting order and morality."[176] The governmental interest was unrelated to the suppression of free expression, the Court explained, and Indiana sought to prevent the "evil" of public nudity "whether or not it is combined with expressive activity."[177] In a concurring opinion, Justice Scalia wrote:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "contra bonos mores," *i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cock fighting, bestiality, suicide, drug use, prostitution,

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310 (1990), considered the prosecution of individuals for burning a flag in violation of the Flag Protection Act of 1989. 18 U.S.C. § 700 (1994). The Flag Protection Act, passed by Congress in 1989 following the Court's decision in *Johnson*, provided, in pertinent part: "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." *Id.* The Court held that the conviction was inconsistent with the First Amendment. In his opinion for the Court, Justice Brennan noted that the Court was aware that flag desecration was offensive to many. "But the same might be said, for example, of virulent ethnic and religious epithets . . . vulgar repudiations of the draft . . . and scurrilous caricatures . . . ." *Eichman*, 496 U.S. at 318 (citations omitted). Punishing flag desecration "dilutes the very freedom that makes this emblem so revered, and worth revering." *Id.*

172. 501 U.S. 560 (1991).

173. *Id.* at 562-63. The Indiana statute provides, in pertinent part, that a "person who knowingly or intentionally, in a public place . . . appears in a state of nudity . . . commits public indecency, a Class A misdemeanor." IND. CODE § 35-45-4-1 (1993).

174. 391 U.S. 367 (1968). In *O'Brien*, the Court set out the following four-part test:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

175. *Barnes*, 501 U.S. at 568. The Court conceded that it was "impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose." *Id.* at 567-68.

176. *Id.* at 569.

177. *Id.* at 571.

> and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist . . . there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."[178]

The purpose of the Indiana statute, as Scalia saw it, "is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified."[179]

In a separate concurrence, Justice Souter argued that the interest asserted by the State in "preventing prostitution, sexual assault, and other criminal activity" was sufficient to justify the enforcement of the statute against the adult entertainment at issue in the case.[180] In his view, Indiana's interest in banning nude dancing resulted from a correlation of such dancing with other evils and, given that correlation, "the interest is unrelated to the suppression of free expression."[181]

Let us turn to two more recent decisions by the Supreme Court, the first dealing with hate speech, the second with hate crimes. *R.A.V. v. City of St. Paul*[182]

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178. *Id.* at 575 (Scalia, J., concurring in the judgment).

179. *Id.* Scalia would have upheld the Indiana statute on the ground that moral opposition to nudity supplied a rational basis for the prohibition of nudity, "and since the First Amendment has no application to this case no more than that is needed." *Id.* at 580.

180. *Id.* at 582 (Souter, J., concurring in the judgment).

181. *Id.* at 586. In his dissenting opinion, Justice White (joined by Justices Marshall, Blackmun, and Stevens) explained that the Court's references to the state's general interest in promoting societal order and morality was not sufficient justification for a statute which reached a "significant amount of protected expressive activity." *Id.* at 590. The purpose of preventing nude dancing in theaters and barrooms "is to protect the viewers from what the State believes is the harmful message that nude dancing communicates." *Id.* at 591. The perceived damage to the public interest caused by nudity on the streets and in public parks was not what the state sought to prevent in prohibiting nude dancing in theaters and taverns, Justice White stated. "There the perceived harm is the communicative aspect of the erotic dance." *Id.* The attainment of the state's goal of deterring certain social and moral harms depended on "preventing an expressive activity." *Id.*

To the extent that the Court was concerned with prostitution and other evils, White continued, the Indiana statute was not narrowly drawn. The state could have required nude dancers to remain a certain distance from spectators, limited nude entertainment to certain hours, required that such establishments be dispersed throughout the city, and criminalized prostitution and obscene behavior. "Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny." *Id.* at 594.

182. 505 U.S. 377 (1992). For discussions of *R.A.V.*, see EDWARD J. CLEARY, BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK *R.A.V.* CASE (1994); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157 (1993); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Turner, *supra* note 3.

held that a city's bias-motivated crime ordinance, which prohibited the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,[183] was facially invalid under the First Amendment in that it prohibited "otherwise

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183. *R.A.V.*, 505 U.S. at 380. The St. Paul, Minnesota, Bias-Motivated Crime Ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

*Id.* (citing St. Paul, Minn. Leg. Code § 292.02 (1990)).

A teenager, Robert A. Viktora, was charged with violating this ordinance after he and several other teenagers assembled and burned a cross inside the fenced yard of an African-American family. *Id.* at 379-80; Turner, *supra* note 3, at 197. Immediately before constructing and burning the cross, Viktora and his cohorts engaged in a discussion of racial tensions, and one of the teenagers told of being accosted by three African-Americans. Viktora recounted that an African-American male had pulled a knife on him, and members of the group were disgusted about the fact that an African-American family was living across the street from one of the teenagers and decided to do something about it. *See* United States v. Juvenile Male J.H.H., 22 F.3d 821, 826-27 (8th Cir. 1994). One teenager suggested puncturing the tires of the black family's car, and another youth responded "that that had already been done and 'it didn't do no good. . . . They're still there.'" *Id.* at 827. Viktora then brought up the movie "Mississippi Burning," and another teenager said, "Let's go burn some niggers." *Id.* A cross was built out of the wooden legs of a bar stool, tape, and cloth. Three of the young men entered the black family's fenced backyard with the cross and a can of flammable liquid and doused the cross with the liquid and set it afire. *Id.* In addition, the teenagers built two other crosses and burned them at a nearby apartment complex and at the street corner directly across from the black family's home. Thus, within a two-hour time span the teenagers burned three crosses in or in close proximity to the black family's home. *Id.*

Viktora was charged with cross-burning in violation of the Minnesota ordinance. *Id.* at 824. The Minnesota Supreme Court held that the reach of the ordinance was limited to fighting words within the meaning of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and therefore reached only expression that the First Amendment did not protect. *See In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991), *rev'd*, 505 U.S. 377 (1992).

Viktora and two other juveniles were convicted for acts of juvenile delinquency, specifically, for having interfered with federal housing rights by force or threat, and having aided and abetted those crimes. *See Juvenile Male J.H.H.*, 22 F.3d at 823. The government argued that the convictions did not violate the First Amendment because two of the juveniles were convicted for cross-burning as a means to threaten and intimidate an African-American family. Agreeing, the United States Court of Appeals for the Eighth Circuit concluded that, unlike the ordinance held invalid by the Supreme Court in *R.A.V.*, the federal statutes violated by the juveniles (18 U.S.C. § 241 (1994) and 42 U.S.C. § 3631 (1988)), prohibited only a mode of expression, i.e., threats of violence and intimidation. Consequently, even if those sections "make content distinctions, they are of a kind that poses 'no significant danger of idea or viewpoint discrimination.'" *Juvenile Male J.H.H.*, 22 F.3d at 826 (citation omitted) (quoting *R.A.V.*, 505 U.S. at 388).

permitted speech solely on the basis of the subjects the speech addresses."[184]

The Court's opinion, authored by Justice Scalia, accepted "the Minnesota Supreme Court's authoritative statement that the ordinance reached only those expressions that constituted 'fighting words' within the meaning of *Chaplinsky*."[185] Noting that fighting words are excluded from the scope of the First Amendment, the Court stated that the exclusion "simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'non speech' element of communication."[186] However, the Court continued, government may not regulate fighting words on the basis of hostility or favoritism towards the message conveyed.[187] The St. Paul ordinance, "limited by the Minnesota Supreme Court's construction to reach only symbols or displays that amount to 'fighting words,' . . . applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[188]

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality--are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.[189]

Moreover, stated the Court, the ordinance involved viewpoint discrimination because displays of some words,

> [such as] odious racial epithets, for example--would be prohibited to proponents of all views. . . . [while] . . . "fighting words" that do not themselves invoke race, color, creed, religion, or gender . . . would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents.[190]

In the final paragraphs of its opinion, the Court took up the city's and amicis' arguments that the ordinance was justified because it was narrowly tailored to serve compelling state interests. "Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been

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184. *R.A.V.*, 505 U.S. at 381.

185. *Id.*

186. *Id.* at 386.

187. *Id.*

188. *Id.* at 391.

189. *Id.*

190. *Id.* (emphasis in original). The Court opined that one could hold up a sign saying that all "anti-Catholic bigots" were misbegotten, but not a sign stating that all "papists" were, "for that would insult and provoke violence on the basis of religion." *Id.* at 391-92.

subjected to discrimination, including the right of such group members to live in peace where they wish."[191] Not doubting that those interests were compelling or that the ordinance could be said to promote them, the Court, concerned with the danger of censorship, asked whether the content discrimination of the ordinance

> was reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.[192]

Justice White's concurring opinion agreed with the Court that the judgment of the Minnesota Supreme Court should be reversed.[193] In his view, however, the case could have been "decided within the contours of established First Amendment law by holding . . . that the . . . ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment."[194] White argued the majority's holding protected narrow categories of expression long held to be undeserving of First Amendment protection. "Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words."[195] For Justice White, it was inconsistent to hold that government may proscribe an entire category of speech but "may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection."[196]

In a separate concurrence, Justice Blackmun argued that by deciding that a state "cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws."[197] Blackmun stated that it was possible that *R.A.V.* would "not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration--a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words."[198] Seeing no First

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191. *Id.* at 395.

192. *Id.* at 395-96 (footnote omitted).

193. *Id.* at 397.

194. *Id.* (White, J., concurring in the judgment, joined by Justices Blackmun, O'Connor, and Stevens).

195. *Id.* at 401.

196. *Id.*

197. *Id.* at 415 (Blackmun, J., concurring in the judgment).

198. *Id.*

Amendment values that were compromised by a law prohibiting "hoodlums from driving minorities out of their homes by burning crosses on their lawns," Justice Blackmun saw "great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community."[199]

Justice Stevens, concurring in the judgment, began his opinion with the statement: "Conduct that creates special risks or causes special harms may be prohibited by special rules."[200] Threatening an individual "because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . ."[201] Such threats "may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules."[202] The Court's "entire First Amendment jurisprudence creates a regime based on the content of speech," Stevens stated, and the "scope of the First Amendment is determined by the content of expressive activity."[203] The line between permissible advocacy and impermissible incitement to crime or violence depends on what the speaker says, and whether the speech falls within the protected or unprotected categories is determined in part by its content.[204]

In his majority opinion, Justice Scalia stated that the federal government can criminalize only those threats that are directed against the President because "the reason why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the . . . President."[205] Stevens took issue with the Court's analysis. As he understood that "opaque passage," Congress could "choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause 'fear of violence,' 'disruption,' and actual 'violence.'"[206]

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199. *Id.* at 416.

200. *Id.* (Stevens, J., concurring in the judgment).

201. *Id.*

202. *Id.*

203. The First Amendment broadly protects "speech," Stevens opined, but does not protect the right to fix prices, breach contracts, place bets with bookies, or violate the Sherman Act. *Id.* at 420.

204. *Id.* at 421.

> Whether a magazine is obscene, a gesture a fighting word, or a photograph child pornography is determined, in part, by its content. Even within categories of protected expression, the First Amendment status of speech is fixed by its content. . . . It can, therefore, scarcely be said that the regulation of expressive activity cannot be predicated on its content: much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.

*Id.* (citations omitted).

205. *Id.* at 388.

206. *Id.* at 424 (Stevens, J., concurring in the judgment).

> Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment--that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words--seems to me eminently reasonable and realistic.[207]

The *R.A.V.* Court also recognized that a state could regulate advertising in one industry but not another because the risk of fraud in the regulated industry was greater than in other industries.[208] Justice Stevens stated that this same reasoning demonstrated the constitutionality of the St. Paul ordinance. "Certainly a legislature that may determine that the risk of fraud is greater in the legal trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats."[209]

Stevens also argued that a selective proscription of unprotected expression "would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression. . . . Such selective protection is no different from a law prohibiting minors (and only minors) from obtaining obscene publications."[210] St. Paul had determined that fighting-word injuries based on race, color, creed, religion or gender were

> qualitatively different and more severe than fighting-word injuries based on other characteristics. Whether the selective proscription of proscribable speech is defined by the protected target . . . or the basis of the harm . . . makes no constitutional difference: what matters is whether the legislature's selection is based on a legitimate, neutral, and reasonable distinction.[211]

Justice Stevens also reasoned that the ordinance regulated speech not on the basis of its subject matter or viewpoint, but rather on the basis of the harm caused by the speech. The ordinance regulated expression that caused injury and did not regulate expression involving discussions that concerned the characteristics of race, color, creed, religion or gender.[212] Even if the ordinance regulated fighting words on the basis of subject matter, such regulation would be constitutional, for subject matter regulations do not raise the same concerns of government censorship presented by viewpoint regulations.[213] The St. Paul ordinance was evenhanded, did not regulate on the basis of viewpoint, and did not "prevent either

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207. *Id.*
208. *Id.* at 388.
209. *Id.* at 424-25 (Stevens, J., concurring in the judgment).
210. *Id.* at 425.
211. *Id.*
212. *Id.* at 433-34.
213. *Id.* at 434.

side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's 'race, color, creed, religion or gender.'"[214] Thus, in Stevens' view, the ordinance simply banned punches below the belt by both parties. "It does not, therefore, favor one side of any debate."[215] Stevens concluded that the St. Paul ordinance regulated expressive activity that was wholly proscribable and did so "not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity."[216]

It appears that what St. Paul lost in *R.A.V.* "--what government at all levels lost--was a form of expression: the use of the criminal law as a means to communicate the public's repudiation of hate speech focused on the race, religion, or gender of its intended victims."[217] Interestingly, the Court did not extend that general principle to hate crimes. In *Wisconsin v. Mitchell*,[218] an individual's "sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race."[219] Under the applicable Wisconsin law, the offense of aggravated battery carried a maximum sentence of two years' imprisonment. Because the jury found that the perpetrator had chosen his victim due to the victim's race, the maximum sentence was increased to seven years.[220] The convicted party challenged the constitutionality of the enhancement statute on First Amendment grounds.

The Wisconsin Supreme Court ruled that the "statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection."[221] The state argued that the statute did not punish bigoted thought, but instead punished only conduct. The United States Supreme Court, concluding that the state's argument was literally correct, stated that the argument did not dispose of the First Amendment challenge. Although the statute punished criminal conduct, it enhanced the maximum penalty for "conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all."[222] Because the only reason for the penalty enhancement was the defendant's discriminatory motive for selecting the victim, the defendant argued that the statute punished bigoted beliefs in violation of the First Amendment. The Court noted that judges traditionally have considered a wide variety of factors in determining which

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214. *Id.* at 435 (emphasis in original).

215. *Id.*

216. *Id.* at 436.

217. KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 97 (1993).

218. 113 S. Ct. 2194 (1993). For a discussion of *Mitchell*, see Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

219. *Mitchell*, 113 S. Ct. at 2196.

220. *Id.* at 2197; *see also* WIS. STAT. ANN. § 939.645 (West 1995).

221. State v. Mitchell, 485 N.W.2d 807, 812 (1992) (emphasis in original).

222. *Mitchell*, 113 S. Ct. at 2199.

sentence to impose, with the defendant's motive being an important factor.[223] It is also "equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."[224]

As to the defendant's argument that the Wisconsin penalty-enhancement statute was invalid because it punished the defendant's discriminatory motive or reason for acting, the Court reasoned that the statute singled out "for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. . . . [B]ias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[225] "The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[226]

Thus some concept of harm has been an element of the Court's analysis of the First Amendment in various contexts. Fighting words can be regulated in order to prevent and deal with the injuries and immediate breaches of the peace resulting from the use of such words.[227] Speech can be regulated if it can be shown that it is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[228] At one time, speech could be regulated in order to address and deter the possible strife and tensions between so-called racial groups that could be caused by the purveyance of falsehoods concerning such groups.[229] A city may constitutionally regulate the areas in which adult motion picture theaters may operate in order to prevent crime, protect retail trade, maintain property values, and generally protect and preserve the quality of neighborhoods, commercial districts, and the "quality of . . . life."[230] Also a state may lawfully enforce a ban on public indecency without violating the First Amendment where it seeks to prevent the evil of public nudity and promote

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223. *Id.*

224. *Id.* at 2200. In Dawson v. Delaware, 503 U.S. 159 (1992), the Court held that the admission of evidence at a capital-sentencing hearing that the defendant was a member of a white supremacist prison gang violated the First Amendment because the evidence proved nothing more than the defendant's abstract beliefs. In another decision, Barclay v. Florida, 463 U.S. 939 (1983), the Court permitted the sentencing judge to take into account the defendant's racial animus (the defendant was a member of the Black Liberation Army) towards his victim. The *Mitchell* defendant argued that *Dawson* and *Barclay* were inapposite because those cases did not involve the application of a penalty-enhancement provision. Rejecting that argument, the *Mitchell* Court stated that in *Barclay* the Court "held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether a defendant should be sentenced to death, surely the most severe 'enhancement' of all." *Mitchell*, 113 S. Ct. at 2200.

225. *Mitchell*, 113 S. Ct. at 2201.

226. *Id.*

227. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

228. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

229. Beauharnais v. Illinois, 343 U.S. 250 (1952). *See supra* notes 119-36 and accompanying text.

230. Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986).

public morality.[231] Additionally a state may constitutionally enact a penalty-enhancement statute for bias-motivated crimes where the state concludes that such conduct inflicts greater individual and societal harm, and is more likely to provoke retaliatory crimes, inflict emotional harms on victims, and incite community unrest.[232]

Cases in which the Court held that a state or locality abridged First Amendment rights have turned, in part, on the Justices' assessments of whether the conduct at issue presented the possibility of potential or actual harm. In *Texas v. Johnson*, the Court pointed out that no disturbance of the peace actually occurred or was threatened to occur due to the burning of the flag,[233] and that no reasonable onlooker would have regarded the flag burning as a direct personal insult or an invitation to fight.[234] The dissenting Justices based their arguments, in part, on the notion that the flag burning had a tendency to incite a breach of the peace, and that a state could regard the conduct as evil or offensive.[235] In *R.A.V.*, Justice Blackmun argued that the Court had manipulated doctrine in order to strike down an ordinance whose premise the Court opposed, "namely, that racial threats and verbal assaults are of greater harm than other fighting words."[236] Justice Stevens, arguing in *R.A.V.* that conduct which creates special risks or causes special harms may be prohibited by special rules, concluded that threatening an individual because of her race or religion may be punished more severely than other threats.[237] In his view, a city council could lawfully, reasonably, and realistically "determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society."[238] As can be seen, issues of harm are considered and relied upon by both liberal and conservative Justices who are clearly influenced by the particular expression exposed to regulation.

## III. THE HARMS OF HATE SPEECH

Speech can cause and inflict injury, and will often be protected "not because it is harmless, but despite the harm it may cause."[239] As noted by Professor Schauer:

> To put it more precisely, existing understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection. Paying a higher price by legally tolerating more harm is thus

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231. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).
232. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).
233. 491 U.S. 397, 408 (1989).
234. *Id.* at 409.
235. *See supra* notes 166-71 and accompanying text.
236. *See supra* notes 197-99 and accompanying text.
237. *See supra* notes 200-04, 206-07 and accompanying text.
238. *See* R.A.V. v. City of St. Paul, 505 U.S. 327 (1992).
239. Schauer, *supra* note 1, at 1321.

> taken to be necessary in order to get more First Amendment protection. Conversely, it appears equally well accepted that being more concerned about speech-related harm by tolerating less of it requires accepting a commensurately weaker First Amendment.[240]

Hate speech is not without cost; those who are the targets of such speech can and do pay the price of the hate-speaker's asserted First Amendment freedom.

### *A. Hate Speech*

It has been recognized, and it seems indisputable, that "[h]ate speech based on race or ethnicity or gender is typically more hurtful and painful to the listener than are other types of generic insults. The literature describing the experience of being victimized by this kind of speech is extensive and convincing."[241] The hurtful experience of "being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face."[242] Individuals are injured by such speech,[243] and the

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240. *Id.* at 1322 (footnote omitted). Professor Schauer has also argued that

> existing understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay for it. This assumption, however, seems curious. It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries. And when in some situations those who bear the cost are those who are least able to afford it, there is even greater cause for concern. If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech.

*Id.*

241. Brownstein, *supra* note 63, at 204.

242. *Racist Speech on Campus*, *supra* note 3, at 452. What about words like "honky," "redneck," and "cracker?" While those words can be harmful epithets in certain contexts, some have argued that such words are not comparably damaging to whites as are epithets hurled against people of color and other so-called minorities. In the view of two commentators:

> The word "honky" is more a badge of respect than a put down. "Cracker," although disrespectful, still implies power, as does "redneck." The fact is that terms like "nigger," "spick," "faggot," and "kike" evoke and reinforce entire cultural histories of oppression and subordination. They remind the target that his or her group has always been and remains unequal in status to the majority group. Even the most highly educated, professional class African-American or Latino knows that he or she is vulnerable to the slur, the muttered expression, the fishy glance on boarding the bus, knows that his degree, his accomplishments, his well-tailored suit are no armor against mistreatment at the hands of the least educated white.
>
> But not only is there no correlate, no hate speech aimed at whites, there is no means by which persons of color and others can respond effectively to this form of speech within the current paradigm. Our culture has developed a host of narratives, mottoes, and presuppositions that render it difficult for the minority victim to talk back in individual cases, and to mobilize effectively against hate speech in general. These include: feelings are minor; words only hurt if you let them; rise above it; don't be so

personal attack of hate speech can produce an instinctive, defensive psychological reaction, as well as fear, rage, shock, and flight.[244]

In a recent article, Professor Calvin Massey discusses five types of harms caused by hate speech and the arguments for the suppression thereof.[245] First, hate speech can produce violence directed toward either the targets of the speech or those who use the speech. "Suppression of speech which incites violence can be justified on the grounds that it serves to protect specific individual interests from invasion and also to preserve a more general societal interest in preventing violent rupture of social norms."[246] Second, hate speech can be harmful to the specific individuals towards whom it is directed. Suppression can be justified on the grounds that the injuries suffered by individual targets of hate speech "are every bit the equal of the loss of reputation, humiliation, or emotional torment suffered by victims of the dignitary torts."[247] Third, suppression of hate speech can be grounded in the justification that it harms those groups which are the target of vilification.[248] Fourth, hate speech may be harmful and require suppression because doing so "will preserve public discourse as a truly autonomous mode of governance."[249] Finally, it has been argued that hate speech should be suppressed because such speech is contrary to the societal consensus with respect to the elemental wrongness of the use of racial epithets. On that view, the suppression of hate speech is "symbolically necessary as an 'unequivocal expression[] of solidarity with vulnerable minority groups.'"[250]

Professor Robert Post has grouped the harms of what he calls "racist speech" into five categories.[251]

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> sensitive; don't be so humorless; talk back--show some backbone. Stated or unstated narratives like these form part of the linguistic and narrative field on which minority victims have to play in responding to taunts and epithets, and of course limit the efficacy of any such response.

Delgado & Yun, *supra* note 17, at 1823 (footnotes omitted).

243. *See Racist Speech on Campus*, *supra* note 3, at 457.

244. *Id.* at 452.

245. *See* Massey, *supra* note 1.

246. *Id.* at 155.

247. *Id.* at 158. Massey refers to the torts of defamation, invasion of privacy, and the intentional infliction of emotional distress. *Id.*

248. *Id.* at 164.

249. *Id.* at 167. There are two branches to this argument. The first argues that hate speech silences members of the targeted groups and effectively excludes them from participation in public discourse. The second argues that hate speech is so irrational and inherently abusive that it serves as an obstacle to a calm and fully deliberative process that is seen by many as the ideal of public discourse. *Id.*

250. *Id.* at 170 (alteration in original).

251. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 271-77 (1991) [hereinafter Post, *Racist Speech, Democracy*]. *See also* ROBERT C. POST, CONSTITUTIONAL DOMAINS 293-303 (1995) (discussing the harms of hate speech) [hereinafter POST, CONSTITUTIONAL DOMAINS].

(1) *"Deontic" Harm.* "The basic point is that there is an 'elemental wrongness' to racist expression, regardless of the presence or absence of particular empirical consequences such as 'grievous, severe psychological injury.'"[252] A society committed to the ideals of social and political equality cannot remain passive, and must "issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals."[253]

(2) *Harms to Identifiable Groups.* Racist expression harms those groups that are the target of the expression. "On this view speech likely to cast contempt or ridicule on identifiable groups ought to be regulated to prevent injury to the status and prospects of the members of those groups."[254] "Racist expression is viewed as especially unacceptable . . . [and] the oppression of already marginalized groups . . ." is locked in.[255]

(3) *Harm to Individuals.* Racist expression, like defamation, invasion of privacy, and intentional infliction of emotional distress, harms individuals. "These injuries include 'feelings of humiliation, isolation, and self-hatred,' as well as 'dignitary affront . . . .'"[256] [R]acial insults conjure up the entire history of racial discrimination in this country."[257] Regulation of racist expressions directed toward individuals may have to be "narrowed to those that are addressed to specific individuals or that in some other way can be demonstrated to have adversely affected specific individuals."[258] In the case of preventing dignitary harms, "the injury might be understood to inhere in the utterance of certain racist communications; if the focus is on emotional damage, independent proof of distress might be required to sustain recovery."[259]

(4) *Harm to the Marketplace of Ideas.* Racist expression harms the operation of the marketplace of ideas.[260] Depending on the way in

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252. Post, *Racist Speech, Democracy, supra* note 251, at 272.

253. *Id.* (quoting David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 456 (1987)).

254. *Id.* at 273.

255. *Id.*

256. *Id.* at 274 (quoting Delgado, *Words That Wound*, *supra* note 3, at 143).

257. *Id.* (quoting Delgado, *Words That Wound*, *supra* note 3, at 157).

258. *Id.*

259. *Id.*

260. *Id.* at 275. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-

which such expression is understood to damage the marketplace of ideas, the class of communications subject to legal sanction "might be confined to communication experienced as coercive and shocking, or it might be expanded to include communication perceived as unconsciously and irrationally racist, or it might be expanded still further to encompass speech explicitly devaluing and stigmatizing victim groups."[261]

(5) *Harm to Educational Environments.* Racist expression can harm the "educational mission of colleges and universities."[262] "Some campus regulation [of racist communications] . . . focuse[s] on the damage that racist expression is understood to cause to particular individuals or groups . . . and proscribe[s] racist expression that 'will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.'"[263] Other college and university regulations seek to inculcate the value of diversity. "[R]acist expression interferes with education . . . because of the . . . harms . . . inflict[ed] on groups or individuals or the marketplace of ideas, [and] also . . . because such expression exemplifies conduct contrary to the educational goals that colleges . . . and universities seek to instill."[264]

Professor Mari Matsuda has written about the specific negative effects of racist hate messages.[265] Victims of hate propaganda experience "physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and

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GOVERNMENT (1948); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimating Myth*, 1984 DUKE L.J. 1; David A. Strauss, *Persuasion, Autonomy, And Freedom Of Expression*, 91 COLUM. L. REV. 334 (1991). The marketplace theory posits that the truth is most likely to emerge if no limitations are placed on utterances that can plausibly be regarded as efforts to present reasons for accepting or rejecting propositions whose truth the speaker asserts or denies. *See* IBEW, Local 501 v. NLRB, 181 F.2d 34 (2d Cir. 1950) (Judge Learned Hand writing for the court), *aff'd*, 341 U.S. 694 (1951). For many, the marketplace theory is problematic. "The notion of ideas competing with each other, with truth and goodness emerging victorious from the competition, has proven seriously deficient when applied to evils, like racism, that are deeply inscribed in the culture." Delgado & Stefancic, *supra* note 58, at 1281. We must also be cognizant of efforts by those who do not doubt their premises or power to employ that power to suppress articulations of opposing positions. Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 865 (1992).

261. Post, *Racist Speech, Democracy*, *supra* note 251, at 275.

262. *Id.* at 276.

263. *Id.* (quoting UNIVERSITY OF CALIFORNIA, UNIVERSITY WIDE STUDENT CONDUCT: HARASSMENT POLICY (1989)).

264. *Id.* at 277; *see infra* Part V.

265. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335-40 (1989).

difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. Professor Patricia Williams has called the blow of racist messages 'spirit murder' in recognition of the psychic destruction victims experience."[266] The personal freedom of targets is restricted, as they "quit [their] jobs, forego education, leave their homes, avoid certain public places . . . and . . . modify their behavior."[267] Some targets reject their "own identity as a victim-group member. As writers portraying the African-American experience have noted, the price of disassociating from one's own race is often sanity itself."[268] "[O]ne's self-esteem and sense of personal security is [also] devastate[d]. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain."[269] Thus, "racist hate messages cause real damage."[270]

Professor Richard Delgado, in a pathbreaking article,[271] identified the harms of racial insults. "[M]ental or emotional distress is the most obvious direct harm caused by a racial insult . . ." writes Delgado, and "mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority."[272] "[A] racial insult is always a dignitary affront . . . [and] is a serious transgression . . . because it derogates by race, a characteristic central to one's self-image."[273] "Verbal tags" provide a means by which individuals may be treated as class members and are "assumed to share all of the negative attitudes imputed to the class."[274] Racial insults keep the targets compliant and inflict psychological harm upon them.[275] Insults and negative stereotypes "can operate as 'self-fulfilling prophecies,'"[276] and minority children begin to question "their competence,

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266. *Id.* at 2336 (quoting Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987)).

267. Matsuda, *supra* note 265, at 2337.

268. *Id.*

269. *Id.* at 2338. Professor Matsuda also notes the effects of racist speech on non-target-group members. The associational and other liberties of whites are curtailed by the use of racist speech, and "dominant-group" members who object to hate propaganda share a "guilty secret: their relief that they are not themselves the target of the racist attack." *Id.* In addition, "at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth." *Id.* at 2339.

270. *Id.* at 2340. *Accord* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 221 (1991).

271. Delgado, *Words That Wound, supra* note 3.

272. *Id.* at 143.

273. *Id.* at 143-44.

274. *Id* at 144.

275. *Id.* at 144-46.

276. *Id.* at 146 (quoting MARTIN DEUTSCH ET AL., SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968)).

intelligence, and worth."[277] Children who are subjected to racial insults may react aggressively or passively.[278] Aggressive reactions can lead to children being labeled as troublemakers, while a passive reaction may result in children turning "the aggressive response on themselves."[279]

### *B. A Specific Example: The "N" Word*

Racial insults and hate speech do not just happen; rather, such expression is an intentional act. "Most people today know that certain words are offensive and only calculated to wound. No other use remains for such words as 'nigger,' 'wop,' 'spick,' or 'kike.'"[280] To provide context and content to this discussion of the harms of hate speech, let us focus on that paradigm of the concept of racial slurs—the word "nigger."[281]

The "n" word, like other slurs and epithets, may be used by the speaker to harm the sensibilities and attack the dignity of those subjected to that verbal attack. "'Nigger' hark[s] back to slavery days"[282] and is more than mere intolerance or incivility. "Nigger," used in certain contexts, is direct and open hostility and a manifestation of racism.[283] One can humiliate an African-American

> by calling him or her a "nig-r." Indeed, the image of someone being called a "nig-r" is perhaps the paradigm of our concept of a racial slur. In our historical context, the notion of blacks as "nig-rs" rationalized their segregation on trains, in schools, in housing, in medical care, and in jobs. It conjures up a stereotype of someone lazy, ignorant, unintelligent and, of course, black. The violence of calling someone a "nig-r" is not merely the refusal to accept someone's humanity, it is the prophecy that, as a black, one will never be accepted. It designates one's color as an unbridgeable divide, an irreducible wall. The epithet becomes a disempowering evocation of a diffuse racial mindset which will everywhere bar access to one's dreams. The evocation depends entirely on social and historical context for its meaning.[284]

Professor Andrew Hacker has described the harmful force of the word

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277. *Id.* at 146.

278. *Id.* at 147.

279. *Id.* at 147.

280. *Id.* at 145 (footnote omitted).

281. *See infra* note 284 and accompanying text.

282. Delgado, *Words That Wound, supra* note 3, at 158.

283. SMOLLA, FREE SPEECH, *supra* note 1, at 153. Mark Fuhrman's use of the word illustrates this point. *See* CHRISTOPHER A. DARDEN, IN CONTEMPT (1996) (discussing Fuhrman's use of the word "nigger" and its impact on the O.J. Simpson criminal trial).

284. D. Marvin Jones, *The Death of the Employer: Image, Text, And Title VII*, 45 VAND. L. REV. 349, 355-56 (1992) (footnotes omitted). Professor Jones does not spell out racial slurs in a "personal effort to avoid harm to others, and to prevent desensitization to harmful words." *Id.* at 365 n.81; *accord* Matsuda, *supra* note 265, at 2329.

"nigger."

> When a white person voices [the word "nigger"], it becomes a knife with a whetted edge. No black person can hear it with equanimity or ignore it as "simply a word." This word has the force to pierce, to wound, to penetrate, as no other has. There have, of course, been terms like "kike" and "spic" and "chink." But these are less frequently heard today, and they lack the same emotional impact. Some nonethnic terms come closer, such as "slut" and "fag" and "cripple." Yet, "nigger" stands alone with its power to tear at one's insides. It is revealing that whites have never created so wrenching an epithet for even the most benighted members of their own race.[285]

Of course, no one is ever a "nigger" or "kike" or "faggot" or "honky" or any other slur or epithet.[286] That "logical" view of such expression is of small comfort, however, to those persons who are subjected to epithets and are harmed by intentional verbal abuse.

That the word "nigger" can be a fighting word is illustrated by the following example. In February 1993, a group of young African-American males in Hampton, Virginia were bowling at a local bowling alley. As two of the young men headed to the snack bar, someone in a group of white bowlers called one of the black youths, Allen Iverson, a "nigger." Iverson responded, "You ain't gonna do nothing to me." One of the whites swung a chair at Iverson and set off a melee between Iverson's friends and the group of whites. Iverson (one of the top basketball and football players in the country) was arrested (no whites were charged),[287] was convicted of "maiming by mob," and was sentenced to fifteen years in prison with ten years suspended. He was denied bail pending the appeal even though felons convicted of more heinous crimes were routinely granted bail. Iverson was subsequently released from prison pursuant to Virginia Governor Douglas Wilder's grant of partial clemency, and is attending Georgetown University and is a member of that school's basketball team.[288]

The epithet "nigger" separates and isolates African-Americans from the rest of society. While in the fourth grade, I eagerly headed out to recess to play kickball with my group of "friends" (who happened to be white). I was told by my "friends" that I could not play with them as I had routinely done before that day. Why not? Because, one of my white classmates said, they could not play with "niggers." I remember to this day being confused and angry. When I asked my teacher why my "friends" were being so mean to me, she responded that I should

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285. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 42 (1992).

286. *See* Thomas C. Grey, *Discriminatory Harassment and Free Speech*, 14 HARV. J.L. & PUB. POL'Y. 157, 164 (1991).

287. *See* David Faulkner, *The Agony and the Ecstacy*, SPORTING NEWS, Jan. 30, 1995, at 26; Ned Zeman, *Southern Discomfort*, SPORTS ILLUSTRATED, Oct. 25, 1993, at 46-47.

288. J. A. Adande, *It's Air Time for Hoyas' Allen Iverson*, WASH. POST, Nov. 27, 1994, at D1; Faulkner, *supra* note 287.

not make trouble.

"Nigger" is used by some whites who claim that they do not understand the reactions of African-Americans to the use of that slur. For instance, an African-American sixth grader threw a white classmate against a locker after the classmate called a black girl a "nigger." The white student did not understand his black classmate's reaction. "Why are you so angry? . . . I didn't call you nigger . . . ."[289]

During one of my eighth grade geography classes, a white student referred to the African nation of "Niger" as "Nigger." My white classmates looked toward me and laughed as I, the only black student in the class, did a slow burn and glared at the person who had pronounced the name incorrectly. The teacher assured me that he meant nothing by it, and we moved on to other continents. I was still angry after class, and I remember the teacher asking me why I was so upset over a "mistake." Shortly thereafter, a white student in my art class said that his parents did not like President John F. Kennedy because Kennedy "liked niggers." I picked up a lump of clay and smashed it into the student's face. (I was sent to the principal's office and, as we said then, "tasted the paddle.")

"Nigger" is used to intimidate, to offend, and to terrorize African-Americans on college and university campuses. A university counselor found the words "Death Nigger" carved into his door.[290] In another incident, a message was slipped under the door of an African student. The message read: "African Nigger do you want some bananas? Go back to the Jungle."[291] A college student walked into a classroom and found the following written on a blackboard: "A mind is a terrible thing to waste--especially on a nigger."[292]

Can or should society regulate and prohibit the use of the word "nigger" whenever that word is used as a racial epithet and slur?[293] I do not think that there

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289. *See* Deborah W. Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237, 239 (1993) (describing an incident involving her son).

290. Barnes, *supra* note 15, at 989.

291. *Racist Speech on Campus*, *supra* note 3, at 433.

292. *Id.*

293. I anticipate the argument that a governmental body's regulation of the "epithet/slur" use of the word "nigger" could also regulate the use of that word when it is directed by some African-Americans at other African-Americans. Some have distinguished between "nigger" and "nigga" or "niggah," a "pronunciation which carries with it a much different, and noninsulting, connotation especially when used by blacks themselves." Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 479 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995). "Nigger" is also used by some African-American rap artists in their music. Such use of the word by African-Americans is the subject of debate within some segments of the African-American communities. *See generally* MICHAEL E. DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM chs. 1, 2 (1993); Paul Delaney, *Amos 'n Andy in Nikes*, N. Y. TIMES, Oct. 11, 1993, at A17; Mark Tran, *Taking The Rap*, THE GUARDIAN, Dec. 13, 1993, at 4.

By focusing on the harm factor, we can see the clear distinction between the epithet/slur use of the word and the non-epithet/slur use. The epithet/slur use carries with it the potential and actual harms of a direct infliction of injury on the target of the expression and a breach of the peace. These harms are not likely (or are not as likely) to occur where the word is used as an expression

is any doubt that, in certain contexts, the word "nigger" can be a fighting word, can cause harm to the targets of those who would use that repugnant term, and can result in a breach of the peace. Imagine that a white person walks up to a black person and screams into the black person's face, "You nigger! You're a nigger!" Are we not concerned that the statement will provoke a verbal and perhaps physical confrontation between the speaker and the hearer? Does not history, reality, and common sense tell us that the use of this slur, epithet, and dagger of hate speech can harm the individuals involved and society in general? Can we not see that the potential and actual harms of the use of epithets and slurs are real and costly, and that there may be significant and legitimate reasons for some carefully crafted rule restricting the purported "free speech" right to call someone a "nigger" or a "faggot" or a "kike" or a "spic" or a "wetback"?[294]

If we accept the notion that the First Amendment does not grant the absolute right to say whatever you want, whenever you want, to whomever you want, and if we accept the view that words like "nigger," particularly when used as an epithet in an assaultive and face-to-face confrontational manner, can be injurious and harmful,[295] why is it so often assumed that the regulation of hate speech does or will violate the First Amendment? Why do some argue, with little hesitation and with much assurance, that hate speech should receive constitutional protection even though other constitutional values, interests, and rights may be adversely affected or even lost?[296] Is it because they disagree with the view that hate speech causes any harm or injury to the targets of the speech? Or is it because they agree and acknowledge that hate speech does harm and injure the targets of such speech, but disagree on the extent of the harm?[297] Is it because they believe that the world

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of "affection" or is used by an African-American rapper as part of his or her artistic expression.

294. In the context of the military, the United States Air Force Court of Military Review affirmed the conviction and sentencing of a white service member to 25 days of confinement and the forfeiture of two months' pay for using the words "nigger" and "spear chucker" when referring to his white former girlfriend's new African-American boyfriend. United States v. Way, 1992 CMR LEXIS 357 (A.F.C.M.R. 1992).

295. Professor Nadine Strossen, a critic of hate speech codes, concedes that certain racially harassing speech communicated in a certain context, such as "I've never tried a nigger," should be subject to regulation consistent with First Amendment principles. Strossen, *supra* note 3, at 490. *See also* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481, 527 (1991) (a supervisor who refers to a subordinate as "a fucking whore" or "a fucking nigger" may have uttered fighting words); *Racist Speech on Campus*, *supra* note 3, at 452 (face-to-face racial insults are undeserving of First Amendment protection).

296. *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 582 (1993).

297. Stefancic & Delgado, *supra* note 10, at 746. Stefancic and Delgado argue that "[t]hough some disagree on the extent of the harm, few disagree that hate speech injures its victims." *Id.* Other nations have recognized the harms of hate speech. *See generally* Elizabeth F. DeFeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57 (1992); Eric Neisser, *Hate Speech in the New South Africa: Constitutional Considerations for a*

is full of purportedly similar and harmful words and epithets, and that all members of society must put up with and tolerate such expression?

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Certain hate speech is low value speech and serves no purpose other than to cause injury to the targets of such speech.[298] Hate speech

> directed at individual members of a suspect class is uniquely valueless, irrational, and undeserving of constitutional protection because it is focused on irrelevant personal characteristics that the victim cannot change. Hate speech and other kinds of expression that can be identified as actionable harassment do not warrant this status because they communicate a noxious idea. Hate speech is harassment because it is targeted expression that serves no purpose other than the infliction of serious harm on its victims.[299]

If hate speech is low value, harassing speech that serves no purpose other than to inflict harm on individuals, can that speech be regulated consistent with the First Amendment using a harms-based approach?

## IV. A HARMS-BASED ANALYSIS

As discussed above,[300] certain speech and expression is often regulated on the basis of some assessment of the value and harm of the speech or expression.[301]

> Our system has carved out or tolerated dozens of "exceptions" to the free speech principle: conspiracy; libel; copyright; plagiarism; official secrets; misleading advertising; words of threat; disrespectful words uttered to a judge, teacher, or other authority figure; and many more. These exceptions (each responding to some interest of a powerful group) seem familiar and acceptable, as indeed perhaps they are.[302]

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*Land Recovering from Decades of Racial Repression and Violence*, 5 SETON HALL CONST. L. J. 103 (1994). The Canadian Supreme Court, in a recent decision, used a harm-based rationale. *See infra* notes 320-55 and accompanying text. The French have concluded that hate speech inflicts "psychological and moral harm . . . [and] damages the individual and collective reputations of its victims." For Germans, "a racial or ethnic attack is an affront to a person's core identity." Stefancic & Delgado, *supra* note 10, at 746. Uruguayan law "expressly acknowledges the pain caused by racist words or acts [and][t]he Netherlands recognizes that racist statements are insulting and distressing." *Id.* "[I]n the United Kingdom, racial vilification is a form of defamation," and in South Africa it is believed that racial insults harm "souls." *Id.*

298. Brownstein, *supra* note 63, at 205.

299. *Id.* at 206.

300. *See supra* Parts I and II.

301. *See* SUNSTEIN, *supra* note 4, at 125.

302. Richard Delgado & David H. Yun, *Essay II: Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 883

Is hate speech, regulated on some basis of harm,[303] one of the exceptions to the First Amendment? If a harms-based analysis is used in the regulation of hate speech, what magnitude of harm must be shown? Even if it is generally agreed that hate speech harms the targets of such speech in that the target "suffers emotional humiliation and personal loss of dignity" and feels "threatened, humiliated, and diminished,"[304] can the harms be regulated without violating the Constitution?

As discussed in Part III above, hate speech can result in deontic harm, can harm identifiable groups and individuals, can hinder the operation of the marketplace of ideas, and can deter the educational environment and mission of colleges and universities.[305] Personal attacks and epithets have been likened to slaps in the face[306] and it has been urged that hate speech causes real physiological symptoms and emotional distress, and results in restrictions of personal freedom, humiliation, loss of self-esteem, and violence.[307]

It is not enough to merely say generally that hate speech is harmful and therefore can or should be regulated. A more refined and nuanced analysis requires that two additional and specific inquiries be made: (1) whether the context, content, and mode of delivery of the speech in question warrants regulation,[308] and (2) whether the specific harms of the at-issue hate speech are of a type and degree that can be regulated without violating the First Amendment. These inquiries must be considered in assessing the constitutionality of hate speech regulation.

A regulator asking the first question must determine whether the particular

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(1994).

303.

> When government intervenes to tell one class of speakers to avoid saying hurtful things to another, governmental aggrandizement is at best a remote concern. This is the reason why regulation of private speech--libel, copyright, plagiarism, deceptive advertising, and so on--rarely presents serious constitutional problems. The same should be true of hate speech regulation.

*Id.* at 889.

304. Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 2 (1991).

305. *See supra* notes 252-64 and accompanying text. On the regulation of hate speech in the college and university setting, see *infra* Part V.

306. *See supra* note 242 and accompanying text.

307. *See supra* notes 245-59, 266, 272 and accompanying text.

308. This is another way of saying that the regulator must determine whether the particular speech and the circumstances of its communication constitutes and falls within some definition of "hate speech" that can be regulated. Of course, the broader the definition of hate speech, the more expansive will be the reach of the regulation. Conversely, a narrower definition of hate speech will limit the reach of the regulation and confine the areas and types of speech subject to regulation. On the need for a contextual inquiry in hate speech matters, see John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653 (1994).

hate speech can or should be restricted on the basis of its specific content, the context in which it was uttered, and the way in which the speaker communicated the particular speech. Consider again the example of the paradigmatic racial slur—the word "nigger."[309] Does that word constitute hate speech which can be regulated under the Constitution? The answer to that question depends on an assessment of context, content, and delivery. If, for example, the word "nigger" is used as an epithet by a white person and is directed in a face-to-face and confrontational manner to and against an African-American, that epithet is potentially subject to regulation. Then, the second inquiry—whether the specific harms of the at-issue expression can be regulated—must be answered as part of the evaluation of the context-content-mode of delivery formulation. Recall the example noted above in which a brawl in a bowling alley was precipitated by the use of the word "nigger" by a white patron.[310] In that context, the word had a particular, assaultive content and was delivered in such a fighting-words way that actually caused the harms of a breach of the peace and violence.

But the same word can be and is used in other contexts and in other ways. Suppose, for example, that a rapper uses the word "nigger" in a song,[311] or that some African-Americans use, in a noninsulting manner, the word "nigger" or "niggah" when referring to other African-Americans.[312] In those contexts, and notwithstanding the fact that the word is the same as the word used in the bowling alley, the word "nigger" may not fall within a hate-speech prohibition because of the different contexts in which the word is used, because the word is not directed in an assaultive, fighting words, face-to-face manner to a "target," and because the use of the word is not likely to cause harm (i.e., is not likely to cause violence or emotional distress).

Is a harms-based approach to the question of whether certain hate speech can be constitutionally regulated workable? Is such an approach fundamentally consistent or inconsistent with First Amendment jurisprudence and the common understandings of what falls within and outside of First Amendment protection? What distinguishes the concededly harmful consequences of speech and expressions that are considered to be outside the protection of the First Amendment[313] from other harmful, yet constitutional, expressions that society has decided must be tolerated by the targets of the harmful speech? Can a harms-based approach provide a useful mechanism for the evaluation of particular expressions mask the political and ideological choices society makes on a daily basis when it regulates or does not regulate certain types of speech? Where is the line drawn, and what stated and unstated values, principles, and beliefs will guide those determinations?

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309. *See supra* notes 282-94 and accompanying text.

310. *See supra* notes 287-88 and accompanying text.

311. *See supra* note 293.

312. *Id.*

313. *See supra* Part II.

### *A. Attractions Of A Harms-Based Approach*

Recall the previous discussion concerning the harms caused by hate speech.[314] Certain hate speech is "assaultive speech" in which words are used as weapons to "ambush, terrorize, wound, humiliate, and degrade,"[315] and the targets of the speech are excluded from full participation in social, political, and educational endeavors. Racial epithets and insults harm the targets of such expression directly, by injuring their psyches and by encouraging third parties to engage in immediate hostile action, or indirectly, by constructing images and stigma-pictures which depict the targets as less than human.[316] As we have seen, harassment and direct personal assaults harm their targets, and can arguably be regulated and are not tolerated (as in other contexts) because of the harm and disruption that such communications and actions cause. Persons who are called "kike," "nigger," "fag," or some other epithet feel threatened and diminished and suffer emotional harm and humiliation as well as personal loss of dignity.[317]

The question whether certain hate speech can be constitutionally regulated must look at the adverse effects on the equality rights of those targeted by such speech. Viewed generally, a harms-based analysis of hate speech—based on an evaluation of the specific harms caused by specific hate speech communicated to specific individuals in specific contexts and circumstances—is not inconsistent with the harms-based First Amendment analysis applied in other areas.[318] A harms-based approach is likely to identify and rectify some of the serious harms caused by hate speech and could therefore provide a constitutional basis for regulation.

Why should the First Amendment not protect certain kinds of hate speech from regulation directed at preventing and remediating the harms of the speech? One obvious answer is that those who are the targets of such speech will either be freed from exposure to such speech or, if such speech is directed at them, will have some means of seeking redress for any injury they may have suffered (thereby discouraging hate-speakers from using such speech). Another answer is that society's expression of its disapproval of hate speech can serve as a significant and universal statement of the norms and expected behavior of its citizenry with respect to issues of race, gender, religion, and the like (just as society expresses its disapproval of libel, perjury, misleading advertising, etc.). If, as in other areas of constitutionally regulated speech, the government can show that the regulation is necessary because the at-issue speech will produce sufficiently bad

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314. *See supra* Part III.

315. MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1 (1993).

316. Delgado & Stefancic, *Essay I*, *supra* note 6, at 855; Delgado & Stefancic, *supra* note 58, at 1276; Ronald Turner, *"Little Black Sambo," Images and Perceptions: Professor Cohen on Professor Lawrence*, 12 HARV. BLACKLETTER J. 131 (1995).

317. Wolfson, *supra* note 304. Such pejoratives are "arguably a mere profane grunt rather than an idea or opinion." *Id.* at 16.

318. *See supra* Part II.

consequences,[319] proponents of a harms-based analysis can plausibly argue and conclude that the regulation of certain hate speech is also constitutional.

An example of an explicit harms-based approach to hate speech regulation is found in a recent ruling by the Supreme Court of Canada, *Regina v. Keegstra*,[320] wherein the court employed a methodology analogous to the American compelling interest/narrowly tailored means test.[321] In that case, a high school teacher was charged and convicted under section 319(2) of the Criminal Code of Canada ("Code")[322] with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. The teacher attributed several evil qualities to Jews and described them as "treacherous," "subversive," "sadistic," "money-loving," "power hungry," and "child killers."[323] In class, he taught that Jewish people sought to destroy Christianity and were responsible for depressions, anarchy, chaos, wars, and revolution. According to the teacher, Jews "created the Holocaust to gain sympathy" and were deceptive, secretive, and inherently evil.[324] Students were expected to reproduce his teachings in class and on examinations, and their grades would suffer if they did not do so.[325]

Addressing the teacher's appeal of his conviction, the Supreme Court of Canada addressed the questions: (1) whether section 319(2) infringed the guarantee of freedom of expression set forth in Section 2(b) of the Canadian Charter of Rights and Freedoms ("Charter"),[326] and (2) whether the presumption

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319. *See supra* Part II.

320. 3 S.C.R. 697 (1990). As discussed below, the Canadian "constitutional" free speech provision at issue in *Keegstra* is "patterned after the United States' conception of free speech, and the doctrinal system of each country uses some type of balancing test to determine the legitimacy of restraints placed on constitutional liberties . . . ." Richard Delgado, *Foreword: Essays on Hate Speech*, 82 CAL. L. REV. 847, 847 n.2 (1994).

321. *See* Massey, *supra* note 1, at 187.

322. That section provides:

> Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

Criminal Code of Canada, R.S.C., ch. C-46, § 319(2) (1985).

323. *Keegstra*, 3 S.C.R. at 714.

324. *Id.*

325. *Id.*

326. CAN. CONST. (Sched. B to Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). Section 2(b) of the Charter provides:

> 2. Everyone has the following fundamental freedoms:
>
> . . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . .

The *Keegstra* Court explained that the reach of Section 2(b) is potentially very wide, "expression being deserving of constitutional protection if 'it serves individual and societal values in a free and

of innocence protected by Section 11(d) of the Charter[327] was unjustifiably breached by reason of section 319(3)(a) of the Code,[328] which affords a defense of truth to the wilful promotion of hatred speech in certain circumstances.[329]

In analyzing the first issue of whether section 319(2) violated Section 2(b) of the Charter, the Court used a two-step approach in which it asked: (1) "whether the activity of the litigant who alleges an infringement of the freedom of expression falls within the protected Section 2(b) sphere";[330] and (2) "whether the purpose of the impugned government action is to restrict freedom of expression."[331] In answering the first question, the Court found that the first step

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democratic society.'" 3 S.C.R. at 727. Some of the convictions fueling the freedom of expression are that seeking and attaining truth is an inherently good activity, participation in social and political decision-making is to be fostered and encouraged, and diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. *Id.* at 728; Irwin Toy Ltd. v. Quebec (Attorney General), 1 S.C.R. 927 (1989).

327. Section 11(d) of the Charter provides:

> 11. Any person charged with an offence has the right
>
> . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . . .

328. Section 319(3)(a) provides:

> (3) No person shall be convicted of an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true.

329. *Keegstra*, 3 S.C.R. at 715.

330. *Id.*

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, and beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

*Id.* at 729 (quoting *Irwin Toy*, 1 S.C.R. at 968). In other words, the *Keegstra* Court stated, "the term 'expression' as used in s. 2(b) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed . . . ." *Id.* (references omitted).

331. *Id.* Government action having the purpose of infringing freedom of expression necessarily infringes the right guaranteed by Section 2(b) of the Charter, the Court wrote:

> If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based.

*Id.* at 729-30.

was satisfied, reasoning that communications which wilfully promote hatred against an identifiable group convey a meaning and are intended to do so by those who make them.[332] The type of meaning conveyed is irrelevant to the question of whether Section 2(b) was infringed. The Court stated the fact that the expression covered by [section] 319(2) is invidious and obnoxious is beside the point. "It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning, and it must therefore be concluded that the first step of the . . . test is satisfied."[333] Responding to the second question, the Court concluded that the purpose of section 319(2)[334] was to restrict the content of expression by singling out particular meanings that are not to be conveyed.[335] "Section 319(2) therefore overtly seeks to prevent the communication of expression, and hence meets the second requirement . . . of the test."[336] Accordingly, the Court concluded that section 319(2) constituted an infringement of the freedom of expression guaranteed by Section 2(b) of the Charter.[337]

The Court's conclusion that section 319(2) constituted an infringement of the freedom of expression guaranteed by Section 2(b) did not conclude the inquiry. The Court then asked whether such an infringement was justifiable under Section 1 of the Charter[338] as a reasonable limit in a free and democratic society.[339] To

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332. *Id.* at 730.

333. *Id.*

334. *See supra* note 322.

335. *Keegstra*, 3 S.C.R. at 730.

336. *Id.*

337. *Id.*

338. Section 1 of the Charter provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. The Court noted that the words "free and democratic society" "embraces [sic] the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution . . . ." *Keegstra*, 3 S.C.R. at 736; *see also* Regina v. Oakes, 1 S.C.R. 103 (1986).

339. As the Court noted, there is no equivalent to Section 1 of the Charter in the United States Constitution.

> Of course, American experience should never be rejected simply because the *Charter* contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be an absolute guarantee of constitutional rights. Where § 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of Charter rights and freedoms, such independence of vision protects these rights and freedoms in a different way. . . . [T]he international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view,

answer this question, the Court had to decide whether the infringement of Section 2(b), occasioned by section 319(2), was justifiable in a free and democratic society. In formulating its answer, the Court looked to section 319(2) and asked "whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type."[340] In assessing harm, the Court looked to: (1) the 1965 Cohen Committee report which found that the incidence of hate propaganda in Canada was not insignificant;[341] (2) the 1984 report of the House of Commons Special Committee which observed that increased immigration and periods of economic difficulty had produced an atmosphere ripe for racially motivated incidents;[342] (3) international human rights principles;[343] and

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> reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.

*Keegstra*, 3 S.C.R. at 743. *See also id.* at 738-44 (discussing American constitutional jurisprudence).

340. *Id.* at 745.

341. REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA (1965) (also known as the Cohen Committee Report). The 1965 Cohen Committee Report stated that there were a small number of persons and a larger number of organizations "dedicated to the preaching and spreading of hatred and contempt against certain identifiable minority groups in Canada." *Keegstra*, 3 S.C.R. at 745 (quoting the Cohen Committee Report). The Committee noted the results of the use of hate propaganda in other countries,

> particularly in the 1930's when such material and ideas played a significant role in the creation of a climate of malice, destructive to the central values of Judaic-Christian society, the values of our civilization. The Committee believes, therefore, that the actual and potential danger caused by present hate activities in Canada cannot be measured by statistics alone.

*Id.*

342. In that report, the House of Commons Special Committee on the Participation of Visible Minorities in Canadian Society noted an increase in hate propaganda in virtually every part of Canada.

> Not only is it anti-semitic and anti-black, as in the 1960s, but it is also now anti-Roman Catholic, anti-East Indian, anti-aboriginal people and anti-French. Some of this material is imported from the United States but much of it is produced in Canada. Most worrisome of all is that in recent years Canada has become a major source of supply of hate propaganda that finds its way to Europe, and especially to West Germany.

*Keegstra*, 3 S.C.R. at 745-46 (quoting the Special Committee report).

343. The Court referred to the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations in 1966. The convention contains a resolution that the state parties agree to

> adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.

*Id.* at 750-51 (quoting the 1966 Convention). *See also id.* at 751-55 (discussing other international covenants and conventions dealing with racism and hatred).

(4) other provisions of the Charter.[344]

In the Court's view, the presence of hate propaganda in Canada was sufficiently substantial to warrant concern. The Court recognized two types of injuries caused by hate propaganda. "First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. . . . Words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group . . . ."[345] Those individuals targeted by hate propaganda therefore are humiliated and degraded, and the "derision, hostility and abuse encouraged by hate propaganda [has] a severely negative impact on the individual's sense of self-worth and acceptance."[346] The impact of such propaganda may "cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority."[347]

A second harmful effect of hate propaganda, the Court continued, is its influence on society at large.[348] Individuals can be persuaded to believe almost anything if information or ideas are communicated by the right technique and in the proper circumstances. "It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society."[349] "Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted . . . ."[350] "The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society."[351]

The Court thus concluded that in enacting section 319(2) "Parliament's purpose was to prevent the harm identified by the [Cohen] Committee as being caused by hate-promoting expression."[352] That objective was of the utmost

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344. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15 (every individual is equal before the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national and ethnic origin, colour, religion, sex, age, or mental or physical disability); CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 27 (the Charter "is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians").

345. *Keegstra*, 3 S.C.R. at 746.

346. *Id.*

347. *Id.*

348. *Id.* at 747.

349. *Id.*

350. *Id.* at 747-48 (citation omitted).

351. *Id.* at 748.

352. *Id.* at 749.

importance, the Court stated, because "Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups."[353] Accordingly, the Court found that a "powerfully convincing legislative objective exists such as to justify some limit on freedom of expression."[354] Consequently, the infringement of the teacher's freedom of expression, as guaranteed by Section 2(b) of the Charter, was upheld as a reasonable limit prescribed by law in a free and democratic society.[355]

*Keegstra* is a real example of the way in which a harms-approach to hate speech works. Canada recognizes that hate propaganda can attack the targeted person and has expressly recognized the ways in which such propaganda harms the targets psychologically and emotionally, causing them to withdraw from society and to forego other endeavors which are available to and enjoyed by persons not targeted. Further, Canada looks beyond the harms suffered by targeted individuals and to the impact of hate propaganda on society. It recognizes that hate propaganda and hate speech are not just spoken and forgotten; rather, such expressions can become part of the social fabric and context and reflect and lead to discrimination and even violence against those who are defiled by such speech. The Canadian Parliament felt that the degree and nature of the actual and potential harm created by hate propaganda were sufficiently serious to require the regulation of such speech. The Canadian Supreme Court, convinced of those harms, upheld that country's efforts to proscribe and punish hate propaganda.

Note the contrast between the American and Canadian approaches to hate speech regulation as illustrated by *R.A.V.* and *Keegstra*, a contrast noted by one scholar in the following passage:

> American courts convey the state's unwieldy ambitions partly through dramatic and even feverish rhetoric in which the judges imagine an apparently endless array of potentially silenced speakers and threats to democracy. . . . The deliberative and careful terms in which the *Keegstra* majority recreates legislative motivation and traces out the sources and justifications for the regulation of hate speech help to create a very different image of the state. The language is not sensational or dramatic, but calm and reasoned. It is less overtly metaphorical and less figurative than the language in the American cases. The state is depicted as careful and responsible, and the measured rhetoric of the Court subtly reinforces this image.[356]

Canada's high court speaks of community and multiculturalism, democracy and mutual respect; the American high court discusses protecting the right of free

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353. *Id.* at 758.

354. *Id.*

355. *Id.* at 787, 795.

356. Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1492.

speech about disfavored topics and ideas and the constitutional prohibition against the imposition of restrictions on hate speakers. The American Court's analysis of hate speech is detached and formalistic.[357] Canada's Supreme Court looked to several kinds of extraconstitutional sources, including international human rights documents to which Canada is a party; the United States Supreme Court does not look to such sources.[358] The Canadian and American high courts also differ on the private versus public aspects of hate speech.

> The American approach to hate speech classifies the target's interest in protection as purely private. The predominant technique of critics, which relies on story-telling and the creation of empathy, implicitly accepts that classification and hopes to generate enough sympathy to make the private plight a matter of public concern. But the failure to challenge the implicit classification of that interest as purely private allows the official discourse to characterize regulation as illegitimate favoritism and to ignore the alternative perspectives. In contrast, the Canadian hate speech cases find that the regulation of hate speech protects not just the targets, but also important public interests, including equal participation in public life, democracy and respect for human dignity and equality. These arguments may further a richer discussion of the potential public--as opposed to merely private--issues in the regulation of hate speech.[359]

Is the Canadian harms-based approach far removed from American jurisprudence on hate crime issues? Consider the United States Supreme Court's decision in *Wisconsin v. Mitchell*.[360] Although that case dealt with penalty enhancements for hate crimes and not hate speech, the Court did recognize that a state may punish a defendant's discriminatory motive or reason for acting, just as governments do under state and federal antidiscrimination laws that have been upheld against constitutional challenge.[361] The Wisconsin statute "singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict

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357. *Id.* at 1449, 1461.

358. *Id.* at 1499 n.257. Also, unlike Canada, the United States is not a party to any of the international instruments mentioned in *Keegstra*. *Id.*

359. *Id.* at 1500.

360. 113 S. Ct. 2194 (1993) (discussed *supra* notes 218-26 and accompanying text).

361. The *Mitchell* Court noted that Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an employee because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (1988). In Hishon v. King & Spalding, 467 U.S. 69, 78 (1984), the Court rejected the argument that Title VII was an unconstitutional infringement of employers' First Amendment rights. In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (discussed *supra* notes 182-216 and accompanying text), the Court referred to Title VII as an example of constitutionally permissible content-neutral regulation of conduct.

distinct emotional harms on their victims, and incite community unrest."[362] The desire of the state to "redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[363] Thus, a state's assessment of harm and its enactment of laws to redress the perceived harms is permissible, at least in the hate crimes context.[364]

The use of a harms-based analysis in *Mitchell* shows that a harms-based analysis of hate speech is not a novel concept.[365] Professor Richard Delgado has argued that the courts should utilize a harms-based analysis—specifically, the tort of intentional infliction of emotional distress— to redress racial insults personally directed at individuals in the workplace and other settings.[366] Defining a racial insult as "language intended to demean by reference to race, which is understood as demeaning by reference to race, and which a reasonable person would recognize as an insult,"[367] he argued for judicial application of tort analysis to incidents involving racial insults because the "racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted."[368] This argument—that we should look "to tort law and . . . that racially, ethnically, and sexually offensive public speech should be prohibited because it intentionally inflicts emotional harm on offended listeners"[369]—warrants consideration.

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362. *Mitchell*, 113 S. Ct. at 2201 (citation omitted).

363. *Id.*

364. Professor Mayo Moran offers another explanation for the Court's decision in *Mitchell*. If the question whether certain speech is constitutionally protected is decided by those in positions of power, and if those individuals will find speech sufficiently dangerous to suppress only where they feel personally threatened, speech will only be suppressed when it appears to those in power that the speech at issue is more than merely offensive and that the speech attacks or threatens them. Moran, *supra* note 356, at 1457 n.124. Conversely, when speech attacks those individuals who do not have social or institutional power, the speech will be constitutionally protected because, in the eyes of the decisionmakers, the speech does not appear to be dangerous. *Id.*

The *Mitchell* Court "finds itself able to sufficiently imagine the perspective of the victim to find that bias-motivated crimes 'inflict distinct emotional harms on their victims.'" *Id.* (citation omitted). Thus, judges who do not "enjoy the same comfort of distance" in hate crime cases as they do in hate speech cases may be more inclined to allow regulation of the former and to invalidate regulation of the latter. "[I]t does not seem accidental that the Court is somewhat incredulous about the claim of harm when it is the kind of harm that could never happen to them, and sympathetic when it is the kind of harm that could befall them and those they care about." *Id.*

365. Harm is an explicit or unstated factor in the constitutional analysis of other areas of speech and communication. *See supra* Part II.

366. Delgado, *Words That Wound, supra* note 3; *see also* Nockleby, *supra* note 308, at 689-711 (arguing for a new, contextually-based tort to redress harms from racial intimidation).

367. Delgado, *Words That Wound, supra* note 3, at 167.

368. *Id.* at 135.

369. David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165, 1166 (1991).

> The harm, which has been variously characterized as an assault or as an infliction of psychic trauma, is argued to be the same as the harm redressed by the private tort of intentional infliction of emotional harms recognized by the Second Restatement of Torts and most jurisdictions. Thus, given such harm, the public interest in redressing it overrides any competing first amendment interests.[370]

Examples of harmful and actionable conduct and speech include a restaurant manager's shouting at a black person that he could not be served because he was black,[371] and a white supervisor shouting at a black employee, "You goddam [sic] 'niggers' are not going to tell me about the [work] rules. I don't want any 'niggers' working for me. I am getting rid of all the 'niggers' . . . ."[372] In another case, a flight attendant yelled at a black passenger, "Get out of the plane you black bastard."[373] The district court wrote that the "galvanic effect of such speech which is intended to turn racial animus into racially-based hostile conduct at least warrants the spotlight of full exposition at trial."[374] These cases illustrate the way in which the intentional infliction of emotional distress tort can be utilized to address the hurt and harms of epithets and racist speech. If such harm can be redressed via tort without First Amendment problems, then why can it not be similarly concluded that certain hate speech regulations are consistent with the First Amendment? Such an argument is certainly plausible. But, as discussed below, the judiciary has not been persuaded by plaintiffs' claims that the emotional harm inflicted by certain language (including hate speech) is intolerable and constitutionally regulable.[375]

One can also anticipate the objection that regulation of hate speech will require line-drawing by regulators and courts. While that general objection may have some force,[376] it is also true that judges "inevitably decide open issues--and many constitutional cases raise such issues--in light of their experiences, interests, perceptions, needs, and biases."[377] That judges may be called on to decide hate speech cases and to sequester unconstitutional from constitutional speech is not

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370. *Id.* (footnotes omitted). "As persuasive as the argument seems, the judiciary has shown little more sympathy for it than for other arguments favoring suppression of offensive speech." *Id.*

371. Fisher v. Carrousel Motel Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967) (the "defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting").

372. Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 217 (1970).

373. Doricent v. American Airlines, Inc., 1993 U.S. Dist. LEXIS 15143 (D. Mass. 1993).

374. *Id.* at *31 (footnote omitted). *See also id.* at *31 n.7 ("such racially motivated galvanic hate speech is today so far beyond the mores of our people as to warrant an action for intentional infliction of emotional distress").

375. Goldberger, *supra* note 369, at 1190.

376. *See infra* note 379 and accompanying text.

377. Becker, *supra* note 36, at 976. *Accord* Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

a unique proposition.

### *B. Objections To A Harms-Based Approach*

What about the other side of the ledger? What arguments can be made in support of the position that a harms-based analysis is not a useful or proper way to approach the issue of hate speech regulation? The fact that some speech causes harm is indisputable.[378] How can we distinguish harmful and constitutionally regulable speech from lawful (i.e., non-regulable) speech? What guides the decisionmaker or the factfinder in the search for the answer to these questions?

That some speech causes harm does not mean that all harmful speech can be constitutionally regulated, for we know that not all speech causes "harm" that rises to a level justifying governmental regulation. Distinguishing regulable harm from non-regulable harm falls to the decisionmaker or factfinder who must draw lines without violating the First Amendment and with due concern for the censorship and self-censorship which can result whenever the government does not permit certain speech. The problem for the decisionmaker is how to approach the notion that "harm must have occurred because the particular utterance in question is itself harm producing."[379]

> For example, a speaker utters an epithet that allegedly causes emotional harm to members of a particular minority group. Whether the epithet in fact caused emotional harm is a judgment that the decisionmaker can hardly make independently from her own judgment that this particular epithet caused harm. Professor Tribe writes that, "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard."[380]

Professor Anthony D'Amato, discussing the problem of assessing harm in a constitutional manner and basing his argument on what he calls "pragmatic indeterminacy,"[381] has argued that the Constitution "should not, and more importantly cannot, allow punishment for speaking words that themselves allegedly 'cause hurt.'"[382] Professor D'Amato is aware of the reality that judges

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378. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988):

> One may not be privileged to mislead a blind man into thinking that a window is a door or to extort a sum for telling him the truth. Justice Holmes was surely right that the first amendment does not protect "a man in falsely shouting fire in a theater and causing a panic." (citations omitted).

379. Anthony D'Amato, *Free Speech and Religious, Racial, and Sexual Harassment: Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 330 (1991).

380. *Id.* (footnotes omitted).

381. *Id.* at 330. "Pragmatic indeterminacy is the current version of American legal realism, stating that law-words, whether statutory or precedential, cannot constrain judges to decide a particular case in a particular way." *Id.* (footnotes omitted). *See also* Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

382. D'Amato, *supra* note 379, at 330.

have to rule on controversies involving speech.

> To the extent that the speech causes harm that is provable independently of a judgment that the particular words uttered caused harm in themselves, judges must resolve those cases under the . . . fundamental proposition that courts exist to address harms. However, cases that consider whether the actual words uttered must have produced the alleged harm, come close to begging the question whether a harm occurred.[383]

That passage should be read and understood in connection with Professor D'Amato's view that no utterances are harmful per se even though many utterances can have harmful consequences to an audience.

> Independent proof of harmful consequences is possible. For example, if I write falsely that someone is a perjurer and my writing leads to his dismissal from his job, then assuming he proves this causal chain, my statement will have defamed that person, and he will have an action in libel against me.[384]

It is not clear that Professor D'Amato's analysis does anything more than punt the tough question of whether society can regulate certain harmful expressions, like hate speech, consistent with the First Amendment, on the basis that society has made a determination that certain hate speech harms others in intolerable and demonstrable ways. Consider D'Amato's following example.

> Suppose someone calls me a "wop." Are my feelings hurt because the epithet is true or because it is false? If someone calls me a "mickey," presumably I should not feel hurt because the epithet does not apply. But then, why should I feel hurt if I am called a "wop"? Have I impliedly chosen to say that it applies by virtue of my very declaration that the statement has harmed me?[385]

We should not confuse harm viewed from the exceptional or atomistic perspective with harm viewed from the more common and broader perspective that looks at and accounts for variant harms caused by such speech. It may be true that some individuals, like Professor D'Amato, would not be upset or have their feelings hurt in the event someone calls them a "wop." It may also be true that a particular individual who is black would not be upset or harmed by someone who calls her a "nigger." The absence of an adverse reaction by certain persons does not tell us anything about what is happening to other persons of color throughout the country, however, and does not tell us if or why D'Amato's or another individual's experiences are the baselines from which we can and should view the propriety of a harms-based approach. We should hesitate before extrapolating from individual assertions, anecdotes, and arguments as we argue for or against,

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383. *Id.* at 335 (footnote omitted).

384. *Id.* at 344.

385. *Id.* at 345.

and formulate and implement, public policy in the hate-speech area.

Is it possible to add some facts to Professor D'Amato's example which would at least call into question the notion that the epithet "wop" is really no big deal? Recall the mode of First Amendment analysis discussed above—content, context, and mode of delivery. What if one of Professor D'Amato's best friends called him a "wop"? What if the person calling him a "wop" was one of his students in the middle of a class? What if the person using the epithet has cornered D'Amato and is yelling the epithet at him in a face-to-face manner? Plug in any other epithet and any other person and context into the foregoing questions and ask yourself whether we can so easily dismiss the harms of epithets and slurs and come to overall conclusions about what is harmful and what is not.

It is noteworthy that some courts have not been receptive to intentional infliction of emotional distress claims based on asserted harms caused by expression. In *Collin v. Smith*,[386] the court held that the plaintiffs could not rely on the tort in their effort to bar public speech by Nazis. The "problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that 'invites dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[387] And in *Hustler Magazine v. Falwell*,[388] the Supreme Court rejected the argument that liability for certain outrageous public statements should be measured pursuant to the *Restatement of Torts*:

> Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.[389]

The Court determined that the vagaries of Virginia's intentional infliction of emotional harm tort "made line-drawing impossible and rendered it vulnerable to subjective application."[390] Outrageousness in political and social discourse is inherently subjective, the Court reasoned, and "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[391] Similar concerns about inherent subjectivity could arise in hate speech cases.

The tort approach to hate speech regulation could be difficult to reign in and could assign the risk of harmful expression to the speaker rather than the

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386. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

387. *Id.* at 1206 (quoting Terminiello v. City of Chicago, 337 U.S. 14 (1949)).

388. 485 U.S. 46 (1988).

389. *Id.* at 53.

390. Goldberger, *supra* note 369, at 1189.

391. *Falwell*, 485 U.S. at 55.

listener.[392] Some will

> find unattractive the degree of paternalism involved in restricting speech on the basis of a few unreasonable although foreseeable reactions, when these do not constitute a significant threat to social order. Moreover, while these approaches would compel actors to internalize costs of 'risky' speech, we do not allow it to reap the equally fortuitous benefits. The net result of this asymmetry would be to discourage speech.[393]

Judicial reluctance to treat harm as a basis for regulation may also be explained by the general view that the customary rationales articulated by courts in offensive speech cases are dispositive and, thus, any related harm question can be safely ignored.[394] On that view, the courts cannot engage in principled line-drawing that will reflect free speech values.

> Because of the plausibility and analytical consistency of the line-drawing rationale, it has substantial persuasive power. It reflects the insight that courts cannot draw clear and objective lines to provide an absolutely reliable means of distinguishing communication that genuinely causes emotional harm from that which offends and provokes but does not cause palpable harm. Any attempt to draw a line will ultimately involve a linguistic formula articulated in a statute or judicial opinion that will be subject to the obvious difficulty of drawing a bright line to delineate permissible speech activities. The difficulty is particularly acute because the formula must also provide a description of the amount of psychological pain that must be suffered by alleged victims before the speech can be punished or suppressed. The measurement of such pain in litigation is an uncertain process, if only because the most important evidence of the pain will be the victim's subjective description of it.[395]

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392. Gates, *supra* note 44, at 16.

393. *Id.* at 16-17.

394. Goldberger, *supra* note 369, at 1199. That view confuses offensive speech with speech that causes identifiable and legally cognizable harms. Offensive speech is "language, public displays, or discomforts associated with communication that triggers an unpleasant emotional response in at least some listeners and that steps over the bounds of perceived good taste." Nockleby, *supra* note 308, at 667. Harmful speech does "more than trigger an adverse emotional reaction in a listener." *Id.* at 668 (footnote omitted). For example, libel has no constitutional value "because libel harms the reputations of individuals in a way that makes it difficult for them to function in society. Libel not only 'offends,' but also harms, the person about whom the libel is disseminated." *Id.* at 668-69 (footnote omitted).

395. Goldberger, *supra* note 369, at 1200. Professor Goldberger notes that in spite of the persuasiveness of the problem of line-drawing rationale, that rationale alone is not sufficient to explain the judiciary's failure to consider emotional harms more carefully. Courts engage in line drawing all the time in First Amendment and other areas of the law, including obscenity, application of the clear and present danger test, libel laws, and the fighting words doctrine. *Id.* at 1202. "[T]he

Moreover, courts may fear the confusion and possible failure to distinguish anger from pain. "[A]nger is easily confused with pain. As a result, an offended listener may be tempted to assert that he has been harmed even though he is instead experiencing anger. This is encouraged by the law's tendency to be more sympathetic to redressing harm than to redressing anger."[396] Applying this to the hate speech arena, courts may be reluctant to allow regulation of such speech where anger and harm[397] are intermingled or inseparable.

A strong objection to an approach in which the only relevant issue is one of harm[398] has been voiced by Professor Cass Sunstein:

> Speech may be regulated if government can make a demonstration that the speech at issue will produce sufficiently bad consequences. This is the only question for the Court. Would it not be possible, and desirable, to have a "single-tier" First Amendment, in the sense that all speech is presumed protected, but we allow government to regulate speech in those rare cases where the harm is very great?
>
> On reflection, this position does indeed seem unacceptable. If it were the law, the same standards of harm would be applied to all speech. This would mean that regulation of (for example) campaign speeches must be tested under the same standards applied to regulation of false commercial speech, child pornography, conspiracies, libel of private persons, and threats. If the same standards were applied, one of two results would follow; and both seem to face decisive objections.[399]

Sunstein discusses two problems with a test based solely on harm. First, the burden of justification imposed on government in showing the requisite level of harm would have to be lowered "so as to allow for regulation of false commercial speech, private libel, unlicensed medical and legal advice, and so forth."[400] Value would not matter, Sunstein argues, as the only question would concern the government's justification "which would have to meet the same standard in all

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many examples of line drawing in speech contexts and in other democracies suggest that the American judiciary's heavy reliance on the difficulty in drawing lines to explain rulings in offensive speech cases leaves a great deal to be desired." *Id.* at 1203.

396. *Id.* at 1200-01; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

397. I do not foreclose the possibility that one could construct an analysis in which anger resulting from being subjected to racial epithets, particularly those delivered in a face-to-face and confrontational manner, would be equivalent to "harm" as that notion is discussed herein.

398. In considering the following discussion of the problem with a sole focus on harm, keep in mind Professor Sunstein's view that the "existence of a two-tier First Amendment is hard to deny; and the tiers are defined by reference to value, not simply by reference to harm." SUNSTEIN, *supra* note 4, at 125.

399. *Id.* at 127.

400. *Id.*

cases."[401] But if the harms-based approach would lower the government's burden for the purpose of permitting regulation of false commercial speech, private libel and the like, "there would seem to be an unacceptably high threat of censorship of many other forms of speech, including political expression. A system in which political speech receives the same relatively low level of protection now given to commercial speech would produce serious risks to democratic self-governance."[402]

Second, Sunstein continues, an exclusive focus on harm could raise the government's burden of justification. Stringent standards applied to governmental efforts to regulate political speech would also be applied to governmental attempts to regulate false commercial speech, child pornography, and unlicensed medical practice. "The same very high burden would be placed on all government efforts to regulate speech. This approach would have the large advantage of removing possible risks to political speech. But it would also ensure that government controls could not be applied to speech that in all probability should be regulable."[403] In other words, an across-the-board application of the most stringent standards to governmental speech controls would ensure that government

> could not regulate (among other things) criminal solicitation, child pornography, private libel, and false or misleading commercial speech. The harms that justify such regulation are of course real. But if we are honest, we will have to conclude that those harms are insufficient to permit government controls under the extremely high standards applied to regulation of political speech.[404]

In addition, regulation of attempted bribes, criminal solicitations, and conspiracy would only be permissible

> when these forms of speech threaten clear and immediate harm. Many attempted bribes, solicitations, and conspiracies are doomed to failure from the start; they do not cause harm in the world. If they are to be treated as core speech for constitutional purposes, they cannot be

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401. *Id.*

402. *Id.* According to Sunstein:

> Such a system might well, for example, allow government to regulate political speech when it is misleading or false. This approach would provide far too little breathing space for important speech. Misleading and even false political speech is part and parcel of vigorous political debate. So too, severe risks would be produced by a system in which libel of government officials received no more protection than libel of ordinary citizens. Such a system would deter criticism of government, and criticism of government is indispensable to democracy. But a framework looking only at harm would put libel of government officials on the same ground as libel of private citizens, and if the current, relatively lenient standards for private libel are to be applied generally, we would endanger democratic processes.

*Id.* at 127-28 (footnotes omitted).

403. *Id.* at 128.

404. *Id.*

regulated when the harm is not likely to occur.[405]

Thus, under Professor Sunstein's view, sole reliance on harm would either lower or raise the standards of regulatory justifications imposed on government. Sunstein correctly concludes that an "inquiry into harm alone would do violence to many of our considered judgments about particular free speech cases. . . . [A] system that does violence to those judgements is not likely to deserve support."[406]

Other concerns relative to a harms-based approach arise when the focus turns to who will decide regulatory issues and how those issues will be decided. A particular administrator's or judge's understanding of the meaning and seriousness or lack of seriousness of harms caused by insult, affront to dignity, harassment, intentional infliction of emotional distress, and similar harms arising from and related to hate speech will certainly affect and predetermine the outcome of cases.[407] "The judge's experience with insult and invective, with black people, with historical episodes such as the Hollywood blacklist, and so on, will all play a role in that understanding."[408] If a judge or decisionmaker does not see or assess the harm of certain hate speech as "serious," the need for regulation will not be apparent and the asserted constitutional right of a hate speaker to engage in the speech will be protected.

### *C. Should A Harms-Based Approach Be Adopted?*

Answering the normative question whether a harms-based approach to the regulation of hate speech should be adopted must take into account the objections to such an approach, the current state of First Amendment law (what Professor Elena Kagan calls the "'ought' in the 'is' of First Amendment doctrine"),[409] and the fact that the judiciary has not been persuaded by claims that the emotional harm inflicted by offensive language is intolerable and compensable.[410] Regulation on the basis of harm is attractive if seen as viewpoint neutral in the sense that speech is regulated on the basis of the harm caused by the speech rather than the viewpoint espoused by the speech.[411] The hard question of whether a harms-based regulation is truly viewpoint neutral must be addressed. If all or some viewpoint-based regulations can be viewed as harm-based regulations then the distinction between the two types of regulations cannot be observed.[412] "For

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405. *Id.*

406. *Id.* at 129.

407. Delgado & Stefancic, *Essay I, supra* note 6, at 858 n.36.

408. *Id.*

409. Kagan, *supra* note 83, at 877.

410. Goldberger, *supra* note 369, at 1190. "There is no official recognition of either the immediate harm done by [hate] speech or the direct connection between such speech and violence against Blacks, Jews, women or homosexuals, to name others who are the object of hate speech and bias crimes." Post, *supra* note 289, at 242.

411. Kagan, *supra* note 83, at 878; Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 612.

412. *See* Kagan, *supra* note 83, at 880. "The substitution of labels--'harm-based' for

it is difficult to see why anyone would opt to regulate a viewpoint that did not cause what seemed (to the regulators at least) to be a harm--or at a bare minimum, that could not reasonably be described as harmful."[413]

Consider other issues relative to a claim that a particular expression made in a particular context has harmed a listener. If, as a matter of law, the expression constitutes fighting words, the target of the fighting words will be able to argue for proscription of the speech on the basis that fighting words are a recognized exception to First Amendment protection.[414] But let us complicate matters. Suppose that a speaker makes the following statement (and consider the content, context, and mode of delivery of the expression).[415] A speaker, in a face-to-face confrontation, directs the pejorative and epithets, "get lost nigger, kike, queer, etc.," at a listener; the expression, arguably a mere profane grunt rather than an idea or opinion, is designed to intimidate rather than rationally communicate an idea. If the grunt is based on factually false premises about a minority group or minority group member and seeks to create fear and to intimidate the listener and target of the expression, can it not be plausibly argued that such expression can be regulated without violating the free speech guarantee? Does not the harm or potential of harm resulting from the content, context, and mode of delivery of the pejoratives and epithets provide a basis for constitutional regulation?[416]

Now change the scenario and suppose that, instead of saying "kike," the speaker says to the listener, "you are a Jew." Also suppose that from the speaker's reading of the Bible Jews are responsible for the death of Christ; that Jews are greedy; that Jews are inherently purveyors of the worst excesses of the capitalist system; that Zionism is racism; that Jews are depraved elements in the body politic; and that Jews should leave all schools and should leave the United States.[417] The statement is

> calm, deliberative, and nasty. It is intellectual (in the sense of reference to the learned sources) and false in its assertions. It threatens Jews and expresse[s] anger and fear. Do we permit this kind of anti-semitic statement because it is expressed and clothed in the garments of rational thought, but ban the "Jew is kike" epithet? If we do, it appears that we are expressing a kind of elitist theory of permissible racist speech. Street vernacular won't cut it, but racism of the academy will.[418]

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'viewpoint-based'--thus either allows most viewpoint regulation to go forward or leaves yet unanswered the central issue of precisely when such regulation is appropriate." *Id.*

413. *Id.*

414. *See supra* notes 99-105 and accompanying text.

415. *See supra* notes 308-12 and accompanying text.

416. *See* Wolfson, *supra* note 304, at 16. "Like an obscene telephone call, a racial epithet is not plausibly taken as part of social deliberation on racial issues, and the harms that it produces go well beyond offense." SUNSTEIN, *supra* note 4, at 187.

417. *See* Wolfson, *supra* note 304, at 16-17.

418. *Id.* at 17. Professor Henry Louis Gates, Jr. has offered a similar example involving the following two statements made to a black freshman at Stanford University.

It could be argued that the tone and content of the statement has political content and should not be regulated,[419] and that a line can and should be drawn which would distinguish speech discussing cultural differences, prejudices, biases, and ignorance from speech that is intended to and does threaten individuals because of their membership in a disfavored group.[420] The point being made is that if First Amendment protection or non-protection will turn on a court's assessment of the harm, insult, and injury to the listener, courts must be aware of the possibility that bland, mediocre, and non-confrontational means are used to communicate the same harmful, threatening, and derogatory thoughts and views communicated by epithets.[421] Thus, a harms-based approach will thrust judges into issues of content and style and will require the courts to "weigh the proportion of emotion and derision to the percentage of pure reason."[422]

Add to the pertinent backdrop the Supreme Court's *R.A.V.* decision,[423] wherein the Court held that governments could not selectively target for regulation and prohibition those fighting words that contained bias-motivated hatred or expressions. *R.A.V.* "indicates that, in general, it's also none of the government's business whether the individual's action conveys a message of racial hatred, or instead conveys a different message or no message at all."[424] Given *R.A.V.* and the real concern that harms-based regulations and viewpoint-based regulations could collapse into and be indistinguishable from each other for the purposes of

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> Levon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African-Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you don't belong here, and your college experience will be a long downhill slide.
>
> . . . .
>
> Out of my face, jungle bunny.

Gates, *supra* note 1, at 45. For Gates, there is no doubt which statement is likely to be more "wounding" and alienating to African-Americans. "Under the Stanford speech regulations, however, the first is protected speech, and the second may well not be: a result that makes a mockery of the words-that-wound rationale." As noted by Delgado and Yun, the "jungle bunny" statement is a more serious example of hate speech because it is not open to argument or a more-speech response, and the statement has "overtones of a direct physical threat." Delgado & Yun, *supra* note 17, at 1820. "The other version, while deplorable, is unlikely to be coupled with a physical threat, and is answerable by more speech." *Id.* *See also infra* note 468.

419. SUNSTEIN , *supra* note 4, at 163.

420. *See* Barnes, *supra* note 15, at 988.

421. Wolfson, *supra* note 304, at 21.

422. *Id.*

423. *See supra* notes 182-216 and accompanying text.

424. Tribe, *supra* note 218, at 13.

discerning the true nature of the regulation of speech, one could conclude, as I do, that a broad harms-based approach to hate speech regulation would be unconstitutional because it would suck large amounts of protected expression from the coverage of the First Amendment.[425]

A narrower and weaker version of the harms-based approach, one which is limited to the regulation of face-to-face, confrontational, and/or harassing expressions and epithets of all kinds (and not just those limited to a selective group of epithets) could pass constitutional muster.[426] Under the narrower version, government could enact laws prohibiting specifically defined types of harassment, threats, intimidation, and epithets which include, but would not be limited to, race, sex, or other status. Thus, if the ordinance at issue in *R.A.V.* had proscribed all fighting words and not just fighting words based on selective categories, the ordinance would have been constitutional.[427] Accordingly,

> a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of *R.A.V.* Viewpoint-neutral laws of this kind--whether framed in terms of fighting words or in some other manner--might be especially appropriate in communities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency.[428]

In sum, a harms-based regulatory approach limited to instances in which a speaker violates a narrowly defined ordinance or regulation prohibiting fighting words or harassment[429] could be constitutional. Courts should uphold such narrow and content-based restrictions on hate speech if the particular speech at issue is not reasonably taken to be part of an exchange of ideas[430] and constitutes unlawful fighting words or harassment by vilification within defined and limited contexts. I will return to this subject in the following Part.

## V. CAMPUS REGULATION OF HATE SPEECH

"[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[431] As stated in *Tinker v. Des Moines Independent School*

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425. "If restrictions on hate speech cover not merely epithets but also speech that is part of social deliberation, they appear overbroad and unconstitutional for that very reason." *Words, Conduct, Caste, supra* note 69, at 813.

426. *See infra* notes 496-99 and accompanying text.

427. Kagan, *supra* note 83, at 889.

428. *Id.* at 889-90.

429. SUNSTEIN, *supra* note 4, at 203.

430. *Words, Conduct, Caste*, *supra* note 69, at 797.

431. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)).

*District*,[432] the First Amendment must always be applied "in light of the special characteristics of the . . . environment" in a particular case.[433] In the context of colleges and universities, the Supreme Court has noted that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[434] That the First Amendment applies to state colleges and universities does not mean that those colleges and universities cannot constitutionally regulate speech and expression. State college and university action is state action for the purposes of the First Amendment, and free and protected speech concerns can be implicated whenever those institutions make speech-related decisions.[435]

Universities necessarily regulate some speech; as Professor Stanley Fish has written, if universities "were only places to encourage free expression . . . it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines or libraries, since freedom of expression requires nothing but a soapbox or an open telephone line."[436] In some circumstances, Fish states, the obvious good of free expression may pose a threat to the university's purpose of investigating and studying matters of fact and interpretation and, at that point, it may be necessary for the university to discipline or regulate speech.[437] Furthermore, universities value speech on the basis of quality, content, and viewpoint, and define what constitutes and counts

> as knowledge, as important, relevant to the world and to the human condition. Inevitably, such assessments regulate speech in terms of content, viewpoint, and even ideology. Indeed, that is the whole point: to promote quality speech as quality is understood within the relevant academic community or by the relevant administrator (or both).[438]

Universities can also go too far in regulating or responding to the speech of

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432. 393 U.S. 503 (1969).

433. *Id.* at 506.

434. *Healy*, 408 U.S. at 180-81. *See also id.* at 201-02 (Rehnquist, J., concurring in the result) (stating that the "constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws," and that a college may expect that its students adhere to generally accepted standards of conduct).

For analysis of the First Amendment and "academic freedom," see University of Pennsylvania v. EEOC, 493 U.S. 182 (1990); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251 (1989).

435. Becker, *supra* note 36, at 1030.

436. STANLEY FISH, *There's No Such Thing As Free Speech and It's a Good Thing, Too, in* DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES 237 (Paul Berman ed. 1992).

437. *Id.* at 238.

438. Becker, *supra* note 36, at 1033.

its faculty members,[439] as illustrated by *Jeffries v. Harleston*.[440] In *Jeffries*, the chairman of the Black Studies Department at the City College of New York sued university officials alleging that they had violated the First Amendment by removing him from the chair because of the content of a speech he had given.[441] The college was concerned that Jeffries' speech threatened recruitment, fund raising, and the college's relationship with the community.[442] At trial, the jury concluded, *inter alia*, that Jeffries had proven that his speech was a substantial or motivating factor in removing him from the chair of the department.[443] The district court ordered Jeffries reinstated as department chairman.[444]

On appeal, the United States Court of Appeals for the Second Circuit noted that protection against government retaliation for speech extends to the government's own employees although the government's need for efficient functioning is a factor; accordingly, when a government employee expresses an opinion on a matter of social or political concern, even where the statement is critical of the government that employs the worker, the government cannot sanction the speech unless the speech impairs the efficiency of government operations.[445] Jeffries' speech unquestionably involved public issues, the court stated, in that the speech criticized the public school curriculum for reflecting racial bias against minorities and discussed the history of black oppression.[446]

> These issues are suffused with social and political hues. True, the tenor of Jeffries' speech was less than ingratiating, and, as evidenced by the ensuing uproar, its content affronted many who heard it or, at least, heard about it. But First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided.[447]

The Second Circuit further concluded that the evidence supported the jury's finding that the college was motivated by the content of Jeffries' speech when it removed Jeffries from the chair of the Black Studies Department, and agreed with the district court that the jury could reasonably have concluded that the college

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439. *See, e.g.*, Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994).

440. 21 F.3d 1238 (2d Cir. 1994), *vacated and remanded*, 115 S. Ct. 502 (1994).

441. In a speech discussing the public school curriculum, Jeffries stated, *inter alia*, that a specific official was "an ultimate, supreme, sophisticated, debonair racist" and a "sophisticated, Texas Jew." *Id.* at 1242. Jeffries also stated that "rich Jews" financed the slave trade, and that Jews and Mafia figures in Hollywood had conspired to "put together a system of destruction of black people" by portraying blacks negatively in films. *Id.*

442. *Id.*

443. *Id.* at 1243.

444. *See* Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993).

445. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

446. *Jeffries*, 21 F.3d at 1245.

447. *Id.* at 1245-46 (citation omitted).

would not have removed Jeffries but for the speech.[448] The college also failed to show that Jeffries' speech interfered with the college's operations. The college had argued that it need only demonstrate a reasonable expectation that Jeffries' speech would eventually cause disruption because Jeffries held a highly visible policymaking position. Although agreeing that government generally has more discretion to sanction employees who serve in confidential, policymaking, or public contact roles, the court concluded that the college had not shown that Jeffries, by virtue of his position as department chair, could undermine the institution's mission with his speech.[449] The applicable institutional by-laws charged the department chairman with carrying out the policies of the department, faculty, and the board of trustees, but did not vest him with the power to make policy. As department chairman, Jeffries performed an essentially ministerial role.[450] Accordingly, the Second Circuit affirmed the finding that the college had violated Jeffries' First Amendment rights, and also affirmed the district court's reinstatement order.[451] Thus, the college's move against Jeffries, predicated on stated but unproven concerns of harm to the institution,[452] was initially held to be an unconstitutional infringement of Jeffries' right to free speech before subsequent developments led to a different result.[453]

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448. *Id.* at 1246.

449. *Id.* at 1247.

450. *Id.*

451. *Id.* at 1248-49. The Second Circuit vacated the punitive damages awards against six individual defendants and remanded for a new trial on the question whether Jeffries should recover punitive damages from those defendants. *Id.* at 1249-50.

452. *See supra* note 449 and accompanying text.

453. Thereafter, and in the wake of Waters v. Churchill, 114 S. Ct. 1878 (1994), the Second Circuit held that university officials did not violate Jeffries' First Amendment rights because they were motivated by reasonable predictions of disruption in university operations. *See* Jeffries v. Harleston, 53 F.3d 9 (2d Cir.), *cert. denied*, 116 S. Ct. 173 (1995). For commentary on the *Jeffries* litigation, see Nathan Glazer, *Levin, Jeffries, and the Fate of Academic Autonomy*, 36 WM. & MARY L. REV. 703 (1995).

In the cited article, Professor Glazer also discusses the case of Professor Michael Levin against the City College of New York. Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992). In a letter to the *New York Times*, a book review, and another letter published in the *Proceedings and Addresses of the American Philosophical Association*, Professor Levin set out his views on affirmative action and the relative intelligence of blacks and whites. Among other things, Levin criticized the *Times* for supporting affirmative action; stated that the only adjustments in educational measures that will allow blacks their due number of successes amount to making course work and tests easier and easier, and that the American polity will have to reconcile itself to an embarrassing failure rate for blacks; and that the reason for the low representation of blacks in the field of philosophy was their lower level of intelligence on average. *See* Glazer, *supra*, at 711.

The university scheduled another section of Professor Levin's required course for undergraduates in philosophy, and explained in a letter to students that the extra section was added because Professor Levin had "expressed controversial views." *Levin*, 770 F. Supp. at 907. An ad

University decisions on faculty hiring and promotion also regulate speech.

> This is the most important and effective way in which an academic institution regulates speech. Much academic speech, particularly in classrooms, student papers, and exams, depends on who is hired. Speech at a law school without any critical race theorists will be different from speech at a law school with several. And hiring and tenure decisions are based on assessments of the quality and content of the applicant's speech, the quality of the applicant's arguments, research, methodology, and, inevitably (especially at the margins of academic discourse within any discipline), viewpoints.[454]

Universities do not offer all possible courses and do not permit a school curriculum devoted to flat earth science.[455] Universities select course offerings on the basis of the content to which students will be exposed, and may not offer courses of particular interest to some students, particularly some people of color and women.[456] Further, there are rules, both written and unwritten, that govern the permissible and expected types of discussion in classrooms. "Such understandings are not made blindly; viewpoint and ideology are inevitably relevant."[457] Student papers and examinations are graded on the basis of the contents thereof and on the professor's evaluation of the student's knowledge and the quality of her reasoning. If the paper or examination "has been based on a viewpoint or ideology the professor considered stupid, irrelevant, irrational, superstitious, or evil, the importance of viewpoint and ideology to evaluating content would be obvious."[458]

Commencing in 1979, many college campuses noticed a significant increase in the number of hate speech incidents directed at blacks, people of color, gays, lesbians, and others. Since the 1986-1987 academic year, the *Chronicle of Higher Education* reports that approximately 175 colleges and universities experienced

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hoc committee reviewed the matter and concluded that Levin's statements regarding the intellectual inferiority of blacks "does, in our view, clearly have the potential to harm the process of education in his classes. . . . Thus we find that it is appropriate for the College to continue to carefully implement ways to protect the students from such harm." *Id.* at 914.

The trial court found that there had been a chilling effect on Professor Levin's exercise of his right to free speech, and permanently enjoined the university from commencing or threatening to commence any disciplinary proceedings against, or other investigations of Levin, predicated solely upon his expression of ideas, and from creating or maintaining shadow or parallel sections of his classes. In addition, the college was ordered to take reasonable steps to prevent disruptions of Professor Levin's classes. *Id.* at 927.

454. Becker, *supra* note 36, at 1034.

455. Wolfson, *supra* note 304, at 5.

456. Becker, *supra* note 36, at 1034.

457. *Id.* at 1035.

458. *Id.* "Imagine, for example, that you are grading an essay question on gradations of punishment for various forms of rape. And imagine that the exam you are reading argues that rape should be legal, indeed rewarded, because women enjoy rape; rape is therefore a good thing. You should be affected by the exam's viewpoint, content, and ideology in assigning a grade to it." *Id.*

serious racial unrest.[459] The National Institute Against Prejudice and Violence has estimated that twenty to twenty-five percent of minority students are victimized at least one time during their college years.[460] For example, in a 1987 incident at the University of Michigan, students shoved a leaflet under the door of a room in which black women were holding a meeting; the leaflet said that blacks "don't belong in classrooms, they belong hanging from trees."[461] Moreover, a racial brawl occurred at the University of Massachusetts following the television viewing of a World Series game;[462] white students at Stanford University scrawled stereotypically black facial features on a poster of Ludwig von Beethoven and placed it outside the dorms of black students;[463] a fraternity member at the University of California at Berkeley shouted obscenities and racial slurs at black students as they passed a fraternity house;[464] and a Berkeley campus disc jockey told black students to "go back to Oakland" when they requested that the station play rap music.[465]

There have been numerous press reports of white students engaging in the verbal or symbolic insulting of black students and other people of color. Those insults include shouted and spray-painted racial denigrations, caricatures of racial facial features displayed on posters, the mimicry of blacks in white sorority parties through make-up, and racial stereotypes exhibited in student newspapers and on campus radio broadcasts.[466]

Experienced observers of the nation's campuses believe this spate of

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459. Delgado & Yun, *supra* note 302, at 872.

460. *Id.*

461. *See* Isabel Wilkerson, *Campus Blacks Feel Racism's Nuances*, N.Y. TIMES, Apr. 17, 1988, at A1; *Racism, Cynicism, Musical Chairs*, THE ECONOMIST, June 25, 1988, at 30. Other incidents occurred at that university, including the distribution of a flier naming the month of April "White Pride Time" and featuring a counseling session on "how to deal with uppity niggers." *See* Deborah R. Schwartz, Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733, 734 (1990). In response to these and other incidents, the University of Michigan promulgated an antidiscrimination policy in 1988. *See* THE UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT OF STUDENTS IN THE UNIVERSITY ENVIRONMENT (1988); *infra* notes 469-79 and accompanying text (discussing court challenge to the policy).

462. *State Starting an investigation of Clash at Massachusetts U.*, N.Y. TIMES, Nov. 18, 1986, at B24.

463. Felicity Barringer, *Campus Battle Pits Freedom of Speech Against Racial Slurs*, N.Y. TIMES, Apr. 25, 1989, at A1.

464. Diane Curtis, *College Campuses Reinforce Rules Barring Racism*, SAN FRANCISCO CHRON., Sept. 18, 1989, at A1, A8.

465. *Id.*

466. *See* HOWARD J. EHRLICH, CAMPUS ETHNOVIOLENCE AND THE POLICY OPTIONS 41-72 (1990); Byrne, *supra* note 3, at 401-02; *Asians at University of Minnesota Receive Racist Letter*, CHRONICLE OF HIGHER EDUC., May 2, 1990, at A3; *Racism Flares on Campus*, TIME, Dec. 8, 1980, at 28.

> abuse to be unprecedented in frequency and intensity. In the lifetime of current educators, universities have been more welcoming to racial diversity than has society as a whole; this racist backlash mocks our hope that education will temper racial animosity.[467]

In response to these serious incidents, many colleges and universities have enacted hate speech codes and regulations of one sort or another.[468] Generally,

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467. Byrne, *supra* note 3, at 401-02. For an account of other incidents, see Schwartz, *supra* note 461, at 734-37.

468. One example of a hate speech code is the Stanford University code created by Stanford law Professor Thomas Grey. The core of that policy stated:

> Speech or other expression constitutes harassment by personal vilification if it:
>
> a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin; and
>
> b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
>
> c) makes use of insulting or "fighting" words or non-verbal symbols.
>
> In the context of discriminatory harassment, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

*The Stanford Discriminatory Harassment Provision, quoted in* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POLICY 81, 106-07 (1991); *Racist Speech on Campus*, *supra* note 3, at 450-51 (quoting policy).

Stanford, a private university, at one time indicated that it would attempt to comply with the First Amendment in regulating hate speech. SUNSTEIN, *supra* note 4, at 203; Grey, *supra* note 286; Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992). It is noteworthy that the policy was asymmetrical in that whites could not direct "verbal assault weapons" against blacks, other people of color, or women, while those protected by the speech code could use all the words at their disposal against whites. Grey, *supra* note 286, at 162. Professor Charles Fried has argued that such "asymmetry would seem to be a defect--an injury not only to traditional free speech principles of content- and viewpoint-neutrality, but also to the value of civility." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty, in* THE BILL OF RIGHTS IN THE MODERN STATE 247 (Geoffrey R. Stone et al. eds., 1992).

On February 28, 1995, a Santa Clara, California Superior Court judge held that Stanford's hate speech policy was unconstitutional under a California law extending to students at private institutions of higher learning the same civil rights enjoyed by students at public universities. Stanford decided not to appeal the Superior Court's ruling. *See* Bill Workman, *Stanford Won't*

hate speech codes prohibit hateful or harassing speech intended to insult or to stigmatize individuals on the basis of their racial, sexual, ethnic, or other status.[469] One study, conducted under the auspices of the Freedom Forum's First Amendment Center, inventoried speech proscriptions in 384 campus handbooks and student guides.[470] Twenty-eight percent of the surveyed institutions had advocacy rules, such as rules prohibiting "any behavior that implicitly or explicitly carries messages of racism, sexism, stereotyping, or discrimination of any kind."[471] Other institutions had general harassment codes which included verbal harassment and made harassment on the basis of particular group status punishable. For example, the University of Southern Maine proscribes "harassment or intimidation of another person."[472] It also prohibits "harassment or discrimination based on race, color, religion, sex, sexual orientation, national origin, or citizenship status, age, disability, or veteran's status."[473] Only eight percent of surveyed institutions prohibited fighting words as defined in the Supreme Court's *Chaplinsky* decision.[474] And fourteen percent of institutions prohibited the intentional infliction of emotional distress.[475]

University hate speech regulations have not fared well when reviewed by the courts. In *Doe v. Michigan*,[476] the court held that the University of Michigan's 1988 policy[477] was unconstitutionally vague and overbroad. Those who drafted the policy had in mind court decisions holding that verbal harassment by coworkers of minorities or women could violate Title VII of the Civil Rights Act of 1964 ("Title VII").[478] In the court's view, the university apparently had no

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*Appeal Ruling on Anti-Hate Speech Rule*, S.F. CHRON., Mar. 10, 1995, at A11; Lynn Ludlow, *Conservatives and free speech*, S.F. EXAMINER, Mar. 5, 1995, at A-12.

469. *See* Turner, *supra* note 3, at 225.

470. *See generally* Arati R. Korwar, *Speech Regulations at Public Colleges and Universities*, ACADEME, Jan.-Feb. 1994. The study omitted separate statements of equal opportunity, affirmative action, and nondiscrimination, as well as sexual harassment policies.

471. *Id.*

472. *Id.*

473. *Id.* at 9-10 (footnote omitted).

474. *Id.* at 10.

475. *Id.* at 11.

476. 721 F. Supp. 852 (E.D. Mich. 1989).

477. The policy prohibited "behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, martial status, handicap or Vietnam-era veteran status" and poses a threat or interferes with an individual's university endeavors. *Id.* at 856. An example of a statement violative of the policy was set forth in an interpretive guide provided by the university's office of affirmative action: "A male student makes remarks in class like 'Women just aren't as good in this field as men.'" *Id.* at 858.

478. 42 U.S.C. §§ 2000e-2000e17 (1988). *See generally* Harris v. Forklift Systems, Inc, 114 S. Ct. 367 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Ronald Turner, *Employer Liability Under Title VII for Hostile Environment Sexual Harassment By Supervisory Personnel: The Impact*

coherent view of the nature or limits of the policy or the university's authority to regulate racist speech, and the policy failed to distinguish unprotected from protected speech. Thus, the court stated, "the University had no idea what the limits of the Policy were and it was essentially making up the rules as it went along."[479]

In 1989, the University of Wisconsin adopted a policy under which students would be disciplined if they intentionally demeaned a specific individual on the basis of his or her race or other specified grounds and thereby damaged the educational environment.[480] In requiring that insults be directed at a specific individual, the drafters of the policy thought that it was necessary to limit the regulation and disciplinary action to fighting words[481] so as to protect the constitutionality of the policy.[482] The policy was challenged in a court action,[483] and the court held that the policy was overbroad and did not meet the requirements of the fighting-words doctrine.

As to the fighting-words doctrine, the court determined that the policy went beyond the present scope of that doctrine in that the policy did not require that the regulated expression, by its very utterance, would tend to incite a violent reaction.[484] Further, the court held that the policy's prohibition of speech which created an intimidating, hostile, or demeaning environment was too broad because the term "hostile" covered nonviolent as well as violent situations, and an intimidating or demeaning environment was not likely to incite a violent reaction.[485] "Since the UW Rule covers a substantial number of situations where no breach of the peace is likely to result, the rule fails to meet the requirements of

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*and Aftermath of* Meritor Savings Bank, 33 HOW. L. J. 1 (1990).

479. *Doe*, 721 F. Supp. at 868.

480. The Wisconsin rule prohibited:

> [R]acist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, or other expressive behavior or physically conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.

WISC. ADMIN. CODE UWS § 17.06(2) (Aug. 1988).

481. *See supra* notes 99-105 and accompanying text.

482. *See* Byrne, *supra* note 3, at 413-14; *see also* Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First-Amendment and University Interests*, 16 J.C. & U. L. 573, 587 (1990) (staff lawyer at the University of Wisconsin discusses the concerns considered in the drafting of the policy).

483. UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991).

484. *Id.* at 1172.

485. *Id.* at 1172-73.

the fighting words doctrine."[486] As to the policy's anti-harassment provision, the court distinguished Title VII from the university's policy. Title VII addresses employment, and not educational settings; Title VII's hostile environment analysis would not apply because the agency analysis applicable to Title VII cases would not hold a school liable for its students' actions (the students are not agents of the school); and Title VII cannot supersede the First Amendment.[487]

*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*[488] involved a fraternity's action for declaratory judgment and an injunction seeking to nullify sanctions imposed upon it by the university because the fraternity conducted an "ugly woman contest" with racist and sexist overtones. During the contest, one member of the fraternity, who happened to be white, dressed as an offensive caricature of a black woman and spoke in slang to parody African-Americans. The fraternity later apologized to the university for the presentation and conceded that the contest was sophomoric and offensive. The dean of students suspended the fraternity from all activities for the rest of the semester, imposed a two-year prohibition on all social activities (with certain exceptions), and required the fraternity to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women.[489] The fraternity brought suit challenging the university's actions.

The United States Court of Appeals for the Fourth Circuit concluded that it was obvious that the contest was "an exercise of teenage campus excess" and reflected a "sophomoric nature."[490] But the fraternity's low-grade entertainment did not necessarily weigh in the First Amendment's inquiry, the court stated, and it would seem that the contest was inherently expressive and thus entitled to First Amendment protection.[491] The university argued that the message conveyed by the fraternity's conduct—that racial and sexual themes should be treated lightly—was antithetical to the university's mission of promoting diversity and providing an educational environment free from racism and sexism.

According to the court, the evidence established "that the punishment was meted out to the Fraternity because its boorish *message* had interfered with the described University mission. It is manifest from these circumstances that the University officials thought the Fraternity intended to convey a message."[492] Further, the court determined that the university's action was unconstitutional under *R.A.V. v. City of St. Paul*.[493] The university punished "those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the

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486. *Id.* at 1173.
487. *Id.* at 1177.
488. 993 F.2d 386 (4th Cir. 1993).
489. *Id.* at 388.
490. *Id.* at 389.
491. *Id.* at 391.
492. *Id.* at 392 (emphasis in original).
493. 505 U.S. 377 (1992).

University's goals and probably embraced by a majority of society as well."[494] The First Amendment, however, generally prevents government from proscribing expressive conduct because of disapproval of the ideas expressed.[495] Concluding that the university had selectively limited speech and could have accomplished its goals in a fashion other than silencing speech on the basis of viewpoint, the court affirmed the district court's summary judgment in favor of the fraternity.

As can be seen, questions of overbreadth, vagueness, and unconstitutional selectivity must be addressed by those institutions with or considering hate speech codes. Although *R.A.V.* did not specifically address hate speech codes and did not provide a complete picture of the regulatory options that might pass constitutional muster,[496] the Court's rationale and analysis suggest that a hate speech code that does not apply in a "neutral" and across-the-board fashion could be unconstitutional.[497] Thus, codes could prohibit defined harassment, threats, or intimidation including but not limited to race, sex, sexual orientation, and so forth,[498] but codes that singled out particular types of hate speech while leaving other forms untouched would not be "neutral" under *R.A.V.* and would therefore be unconstitutional.[499]

Furthermore, a code would apparently pass First Amendment muster if it was restricted to prohibitions of harsh and confrontational face-to-face epithets and invective calculated to disrupt the targeted person's ability to function on campus and enjoy the same opportunities and benefits that are available to all students.[500] Recall that in *R.A.V.* the Court noted that the city could have achieved "precisely the same beneficial effect" through an "ordinance not limited to the favored topics . . . ."[501] Hence, an ordinance prohibiting all fighting words would have been constitutional; an ordinance prohibiting fighting words based on race, sex, or some other specific category was unconstitutional. Broader hate speech codes (not limited to specific categories or topics) do carry a practical risk, however. The broader the code, the more extensive its regulatory reach and the more vulnerable the code is to charges of unconstitutional vagueness and overbreadth. Regulating broad categories of fighting words, harassment, intimidation and the like have indefinite parameters that are vulnerable to unconstitutional manipulation.[502]

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494. *Iota Xi*, 993 F.2d at 393.
495. *Id.* (citing *R.A.V.*, 505 U.S. at 382).
496. *See* Brownstein, *supra* note 63, at 209.
497. Delgado & Yun, *supra* note 302, at 886.
498. *See* Kagan, *supra* note 83, at 889.
499. Delgado & Yun, *supra* note 302, at 886.
500. *Id.*
501. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).
502. Brownstein, *supra* note 63, at 208. *See also* Kagan, *supra* note 83, at 889-90:

> A law prohibiting, in viewpoint-neutral terms, not merely fighting words but other kinds of harassment and intimidation would (and should) face greater constitutional difficulties, relating most notably to overbreadth and vagueness; but a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of *R.A.V.* Viewpoint-neutral laws of this kind--whether

No student or member of a university community has the right to utter face-to-face epithets or invective to another student or member of the university community. The targeted student or member of the community has a right not to have the face-to-face epithets and invective uttered to her, and a college or university has the right and obligation to address and redress the harms to educational environments caused by hate speech.[503] Speech codes drafted to address and to prohibit such speech may be necessary to the specific context, operation, and mission of academic communities. As noted above, universities impose limits on the topics discussed in classrooms, impose subject matter restrictions as part of the educational process, ban or discourage irrelevant discussions, require students to treat other students and members of the academic community with a minimum of civility and respect, make judgments on the quality of communications that affect admissions and the evaluation of students and prospective and actual faculty, and engage in viewpoint discrimination when making academic judgments.[504] Universities and colleges may not censor as they please, but as a practical matter those institutions, seeking to promote and protect the educational mission, do and must control speech in ways that other non-educational institutions do not and cannot.

> Surely the educational mission ought to grant the university somewhat greater room to maneuver, especially in light of the complexity and delicacy of the relevant policy questions. Courts might also hesitate before finding viewpoint discrimination or impermissible selectivity. Perhaps there should be a presumption in favor of a university's judgment that narrowly defined hate speech directed at blacks or women produces harm that is especially threatening to the educational enterprise.[505]

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framed in terms of fighting words or in some other manner--might be especially appropriate in communities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency.

503. POST, CONSTITUTIONAL DOMAINS, *supra* note 251, at 296-97; Delgado & Yun, *supra* note 302, at 891. Professor Post argues that the constitutionality of hate speech regulations on university and college campuses depends upon the logic of instrumental rationality, and specifically upon three factors: (1) the nature of the educational mission of the university; (2) the instrumental connection of the regulation to the attainment of the mission; and (3) the deference that courts should display toward the instrumental judgment of institutional authorities. "The current controversy regarding the constitutionality of regulating racist speech on university and college campuses may most helpfully be interpreted as a debate about the first of these factors, the constitutionally permissible educational objectives of public institutions of higher learning." POST, CONSTITUTIONAL DOMAINS, *supra* note 251, at 324 (footnote omitted).

504. *See supra* notes 436-58 and accompanying text; SUNSTEIN, *supra* note 4, at 199-200.

505. SUNSTEIN, *supra* note 4, at 202.

## CONCLUSION

Some speech is constitutionally protected even though it harms other individuals. Some speech is not constitutionally protected because it harms other individuals. What explains the constitutional protection in the former but not the latter? It is my view that a harms-based analysis is in fact a part of the explanation of the protection and non-protection of certain speech, and that the valuation of the type and extent of the harm explains, at least in part, why the regulation of some speech (like child pornography) is deemed to be uncontroversial, while the regulation of other speech (like certain hate speech) is controversial. The actual and perceived harms of child pornography are such that society has rightly and understandably moved to prohibit such speech.

If harm is a criterion, can it not be plausibly argued that certain hate speech can and should be rightly and understandably condemned and prohibited without violating the First Amendment? If one answers that question in the negative, is it not because of a different valuation of both the speech itself and the actual and perceived harms of the speech? I submit that the valuation of the at-issue speech is a critical component of First Amendment analysis, even where such valuation is not expressed or spelled out. This often silent but always present judgment as to the level and degree of harm is found in the constitutional regulation of many forms and varieties of speech.[506] This is not to say that all speech that can or does cause harm can be constitutionally regulated; it is to say that those who contend that hate speech cannot be regulated without violating the First Amendment should be asked to explain why an assessment of the harm to the targets of such speech should not be part of the constitutional calculus. In other words, if as a general proposition, it is proper to assess harm in making determinations about the constitutionality of certain speech, it should be proper to assess harm relative to hate speech.

While it is true that courts may not be receptive to harms-based arguments,[507] a consistent and principled approach to First Amendment questions requires a discussion and evaluation of the harms of hate speech as well as recognition that what is really at play in the regulation of hate speech and all other speech is an exercise consisting of value judgments regarding the speech in question. One can certainly debate plausible and contending perspectives on the question of harm in a particular case involving the regulation of speech. My point is that truth-in-labeling and an accurate description of what is actually done in this country with regard to the regulation of speech should be recognized as we continue to debate issues relative to and arising from the regulation of hate speech.

Regulation of hate speech may or may not be a "good" idea. But the regulation of hate speech is not so far removed from other societal restrictions on certain expressions. I am not urging a broad ban on hate speech, for such a ban would violate the First Amendment in that it would prohibit a great amount of

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506. *See supra* Part V.

507. *See supra* notes 335-408 and accompanying text.

speech that contributes to public deliberation.[508] I do submit that those who argue against even narrow hate speech regulations should at least consider an analysis that accounts for the harm factor and any explicit or implied valuation of the at-issue speech, and should not rely on a knee-jerk, conclusory, and "of course that's unconstitutional" reaction to hate speech regulations and codes.

508. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 251 (1993).

# "FIGHT OR F . . ." AND CONSTITUTIONAL LIBERTY: AN INMATE'S RIGHT TO SELF-DEFENSE WHEN TARGETED BY AGGRESSORS

JAMES E. ROBERTSON*

"Many times you have to 'prey' on someone, or you will be 'preyed' on yourself."
Jack H. Abbott, *In the Belly of the Beast*[1]

## INTRODUCTION

Incarceration exposes male inmates to a "world of violence"[2] where staff cannot or will not protect them from rape, assault, and other forms of victimization.[3] To make matters worse, retreating in the face of danger is neither normative nor feasible;[4] in prison your back is always against the wall. Most inmates have but two options: to fight in self-defense or become passive victims of a predatory subculture. Indeed, the best defense may be to attack first, thus

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1. JACK H. ABBOTT, IN THE BELLY OF THE BEAST 121 (1981).

2. MATTHEW SILBERMAN, A WORLD OF VIOLENCE 2 (1995). Studies of inmate violence infrequently address female-on-female assaults. Aside from possible gender bias, two factors may account for this discrepancy in the penological literature. First, the extant studies indicate that assault rates are much lower in women's prisons than in men's prisons. LEE H. BOWKER, PRISON VICTIMIZATION 49 (1980) [hereinafter PRISON VICTIMIZATION]. Second, female prisoners comprise only a small portion of the total prison population. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 600, tbl. 6.29 (1994) [hereinafter SOURCEBOOK] (847,271 sentenced male prisoners versus 46,595 females in 1992).

3. PRISON VICTIMIZATION, *supra* note 2, at 12-13 (top correctional officials unwilling to commit resources needed to protect vulnerable inmates); Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions, in* THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch, eds., 1982) [hereinafter *Victimizers and Victims*] ("inadequate supervision by staff members" is one of several factors responsible for "controlled war"); Donald R. Cressey, *Foreword* to JOHN IRWIN, PRISONS IN TURMOIL at vii (1980) ("[the guards] have withdrawn to the walls, leaving inmates to intimidate, rape, maim, and kill each other with alarming frequency"); Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Rape and Their Willingness to Respond to Acts of Rape, in* PRISON VIOLENCE IN AMERICA 145, 159 (Michael C. Braswell et al. eds., 2d ed. 1994) ("[I]n the prison vernacular, they seem to offer little assistance to inmates except the age-old advice of 'fight or fuck.'"); Peter Scharf, *Empty Bars: Violence and the Crisis of Meaning in Prison, in* PRISON VIOLENCE IN AMERICA 27, 28 (Michael C. Braswell et al. eds., 2d ed. 1994) ("Prisons are largely unable to protect the physical safety of their inmates."); CARL WEISS & DAVID J. FRIAR, TERROR IN THE PRISONS 68 (1974) ("The first thing a new inmate learns is that the prison authorities cannot protect his body's privacy. His next discovery is that the inmates actually run the prison.").

4. *See infra* notes 26-32 and accompanying text (discussing inmates' lack of options when confronted with aggressive, exploitive nature of the inmate society).

blurring the line between aggressor and target. As one experienced inmate counseled:

> Well, the first time [a potential sexual aggressor] says something to you or looks wrong at you, have a piece of pipe or a good heavy piece of two-by-four. Don't say a damn thing to him, just get that heavy wasting material and walk right up to him and bash his face in and keep bashing him till he's down and out, and yell loud and clear for all the other cons to hear you, "Mother fucker, I'm a man. I came in here a mother fucking man and I'm going out a mother fucking man. Next time I'll kill you."[5]

Prisoners who fight rather than submit, particularly those who engage in preemptive attacks, are nonetheless in a quandary. While their safety may depend upon their embracing violence, its use could lead to disciplinary sanctions.[6] Inmates readily grasp their "no-win" situation:

> [Inmate] PC 15: As far as the inmate is concerned, you have to prove yourself to other inmates, as a man. Whereas to the [prison disciplinary] adjustment committee . . . you're proving yourself to be a fool. That's where it bounces.
>
> [Inmate] Cox C-2 23: Oh, I felt like I wanted to break out when I just looked at the guy. I just wanted to walk up to this guy and say, "You have been bothering me a whole lot." And just smash him in the face. But, you know, there is a lot of things that makes a guy hesitate about fighting in here, and the [disciplinary] record happens to be one of them.[7]

This Article examines the constitutional ramifications of the targeted inmates' dilemma. Part I reviews the demographics and origins of inmate-on-inmate violence. Part II describes the extant law of inmate self-defense. Part III contends that constitutional liberty[8] embraces certain instances of inmate self-defense,

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5. PIRI THOMAS, DOWN THESE MEAN STREETS 256 (1967).

6. Inmates could also face criminal charges under state and federal law. The Fifth Amendment prohibition of double jeopardy is inapplicable in such cases because disciplinary sanctions are not the sorts of punishment envisaged by its drafters. Garrity v. Fiedler, 850 F. Supp. 777, 779 (E.D. Wis. 1994). *See generally* U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). The role of self-defense in criminal cases arising from inmate-on-inmate violence will not be addressed by this Article.

7. HANS TOCH, LIVING IN PRISON 211 (rev. ed. 1992). Toch observed that the targeted inmate is in a "double bind": "He knows that inmates and staff respect a man who fights, but that violence brings punishment and can affect one's chances for parole. Since the positive and negative pressures emanate from the same milieu, they produce confusion, disorientation, and sometimes discomfort . . . ." *Id.* Similarly, Lockwood wrote that "[t]he fear of disciplinary infractions . . . puts some targets in a dilemma. Should they consider their long term welfare or fight to alleviate an aggressor's pressure?" DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 57 (1980).

8. Liberty is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. The Fifth Amendment provides in part: "No person . . . [shall] be deprived of life,

thereby precluding the imposition of disciplinary sanctions on targeted inmates. Finally, this Article examines the likely impact on staff and inmates should vulnerable, targeted inmates possess a constitutional right to self-defense.

## I. THE WALLED BATTLEFIELD

Among the "pains of imprisonment" delineated in Gresham Sykes' ground breaking study *The Society of Captives*, the most ironic is the loss of security.[9] Founded in the nineteenth century to reform offenders,[10] the American prison has degenerated into a walled battlefield that inflicts upon its male residents unmatched levels of murder and assault. The United States Department of Justice reported that state inmates killed forty of their own and committed 7,397 assaults upon one another in 1993.[11] But official data grossly understates the true level of violence largely because inmate victims are reluctant to come forward.[12] Although

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liberty, or property without due process of law . . . ." U.S. CONST. amend. V. An early ruling of the Supreme Court, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), limited the reach of the Due Process Clause in holding that the Bill of Rights does not constrain state action. *Id.* at 247. The Due Process Clause of the Fourteenth Amendment, however, does speak to the states by proclaiming that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

9. Sykes posited that inmates experienced loss of liberty, goods and services, heterosexual contacts, autonomy, and security. GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 63-83 (1958). Regarding the latter, he wrote:

> However, strange it may appear that society has chosen to reduce the criminality of the offender by forcing him to associate with . . . other criminals for years on end, there is one meaning of this involuntary union which is obvious—the individual prisoner is thrown into prolonged intimacy with other men who in many cases have a long history of violent, aggressive behavior. It is a situation which can be anxiety-provoking even for the hardened recidivist and it is in this light that we can understand the comment of an inmate of the New Jersey State Prison who said, "The worse thing about prison is you have to live with other prisoners."

*Id.* at 76-77.

10. The rise of the American penitentiary in the early nineteenth century is closely linked to social reformers who sought to alleviate criminality by subjecting inmates to regimes of labor, silence, and prayer. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 57-108 (1971). By the 1830s, the penitentiary had taken root; most states revised their criminal codes to provide for imprisonment rather than the traditional corporal punishments. BLAKE MCKELVEY, AMERICAN PRISONS 25 (1977). By the close of the nineteenth century, however, American prisons were a manifest failure: instead of reforming their wards, they functioned as "custodial warehouse[s] for social refuse." ROBERT JOHNSON, HARD TIME 33 (1987). The contemporary prison continues the long tradition of warehousing offenders, but unlike earlier eras, does so as part of a manifest correctional strategy. *See* FRANK SCHMALLEGER, CRIMINAL JUSTICE TODAY 424-28 (1991) (discussing warehousing and overcrowding in contemporary prison).

11. SOURCEBOOK, *supra* note 2, at 665, tbl. 6.106.

12. "Quantifying the level of prison violence is difficult at best. Official incidence reports

estimates vary regarding the actual amount of prison violence, especially sexual assaults,[13] unquestionably the victimization of inmates by inmates is routine and expected[14] and the corresponding fear of violence is indeed great.[15] One commentator tells us:

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. . . are so under inclusive as to be almost wholly devoid of meaning." Grubbs v. Bradley, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982). A landmark study of Philadelphia's jail estimated that 1000 assaults occurred annually, but only three percent were reported. Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANS-ACTION 8, 12 (1968). A survey of federal prisoners also found considerable underreporting of violence. In a three month period, 391 inmates reported 2,265 infractions but there were only 66 official reports. John D. Hewitt et al., *Self-Reported and Observed Rule-Breaking in Prison: A Look at Disciplinary Response*, 1 JUST. Q. 435, 441 (1985).

13. PRISON VICTIMIZATION, *supra* note 2, at 2-3 (estimates of rapes range from 4.7% in the Philadelphia prison system to a much higher rate in a Tennessee prison, where three of four inmates recalled one or more rapes each month); Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. TIMES, Dec. 29, 1993, at A11 (annually, some 290,000 male inmates are sexually assaulted); Eigenberg, *supra* note 3, at 145-47 (0.3% to 14% of male inmates are raped); LOCKWOOD, *supra* note 7, at 18 (of the inmates most at risk—young white males in New York prisons—71% stated that they had been targets of sexual aggression versus 28% of all inmates, but only one or two actual sexual assaults occurred each year); WEISS & FRIAR, *supra* note 3, at 4 ("Homosexual rape is no surprise to any of the inmates. They all know it happens. It is the first thing you hear about when you enter prison. It is the first thing you fear."); Donald J. Cotton & Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 48 (1982) ("However, any available statistics must be regarded as very conservative at best since discovery and documentation of this behavior are compromised by the nature of prison conditions, inmate codes and subculture, and staff attitudes."). In addition to rape, there are two other forms of non-consensual sexual behavior: (1) sexual harassment, e.g., "Guys would whistle at me and say I got a nice ass"; and (2) sexual extortion, e.g., "I owed this guy gambling losses . . . now he told me I could settle my account by giving him some head." *Id.* at 49.

14. Hadley v. Peters, 841 F. Supp. 850, 858 (C.D. Ill. 1994) (citing Hibma v. Odegoard, 769 F.2d 1147, 1159 (7th Cir. 1985)) ("Violence is unfortunately endemic in American prisons."); STAN STOJKOVIC & RICH LOVELL, CORRECTIONS 340 (1992) ("The prison is a violent place."); Hans Toch, *Studying and Reducing Stress, in* THE PAINS OF IMPRISONMENT 25, 41 (Robert Johnson et al. eds., 1982) (The prison is a "human warehouse with a junglelike underworld."); HANS TOCH, POLICE, PRISONS, AND THE PROBLEM OF VIOLENCE 53 (1977) [hereinafter POLICE, PRISONS] ("Jails and prisons . . . have a climate of violence which has no free world counterpart."); Scharf, *supra* note 3, at 28 ("Rapes, beatings, knifings, and killings are commonplace occurrences in many prisons.").

15. Clearly, the fear of victimization is great. *See* PRISON VICTIMIZATION, *supra* note 2, at 1 ("Even in institutions where the rape rate is relatively low—perhaps averaging no more than a few incidents per year—there is a widespread fear of being raped, and this fear motivates prisoners to defend themselves carefully against the possibility."); James E. Robertson, *Surviving Incarceration: Constitutional Protection From Inmate Violence*, 35 DRAKE L. REV. 101, 106 (1985-86) ("[T]he fear of violence is the *lingua franca* of the contemporary prison."); POLICE, PRISONS, *supra* note 14, at 53 ("Inmates are terrorized by other inmates, and spend years in fear of harm.").

> [A]nyone who reads the evidence accrued in the hundreds of lawsuits brought to the courts by state prisoners in the past few years can only conclude that all too many American prisons - perhaps the majority - are depressing, rat-infested, heavily overcrowded fortresses that have created perverse societies in which violence, homosexual rape, and other assorted cruelties are everyday occurrences.[16]

Men's prisons are violent because they contain people who would be violent in any social setting. The inmate population's propensity for violence is attributable to several factors. Its youthfulness places a resident among the most violent age-cohort.[17] Many inmates, particularly those who are "state-raised,"[18] come from subcultures that embrace violence as an appropriate medium for settling disputes and securing justice.[19] Virtually all offenders partake of a broader, cultural legitimation of defensive violence by males facing threats to their manhood, property, or families.[20]

The prison environment also breeds inmate-on-inmate violence. The inmate subculture equates manliness and status with displays of "toughness" and aggression.[21] Inmate norms legitimate violence as a means of conflict resolution.[22]

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16. KENNETH C. HAAS & GEOFFREY P. ALPERT, THE DILEMMAS OF CORRECTIONS 83 (1991).

17. Persons between 17 and 29 years of age comprised 53.5% of all men confined in state prisons in 1991. SOURCEBOOK, *supra* note 2, at 611, tbl. 6.40. Of the relationship between age and violence, Graemen Newman observes that one of the "universal facts concerning crime . . . [is that] the bulk of crime, especially violent crime, is committed by the young persons of any culture . . . ." His second universality is that males commit most violent crime. GRAEME NEWMAN, UNDERSTANDING VIOLENCE 116 (1979).

18. State-raised inmates are "graduates" of reform schools and other youth prisons. JOHN IRWIN, THE FELON 26-29 (1970).

19. JOHNSON, *supra* note 10, at 89. Johnson described the state-raised inmate as "emotionally stunted, a perpetual, impulsive adolescent," who employs violence to establish his "manly image." *Id.* at 87, 90. John Irwin identified four themes of the state-raised system: 1) a commitment to toughness; 2) a tendency to band together in cliques; 3) prison homosexuality; and 4) a belief that a return to the "streets" is only a temporary vacation. IRWIN, *supra* note 18, at 26-28.

20. SILBERMAN, *supra* note 2, at 69. Silberman observed that American culture also legitimates "self-defense attitudes" in and out of prison:

> The . . . cultural trait, *self-defense attitudes*, involves the legimation of the use of violence in the defense of property ("a man's house is his castle") and the weak and defenseless (women and children). This set of attitudes, which is tied to traditional notions of male dominance, justifies the use of violence in the protection of a man's property, including "his" women and children, on a level that cannot be found in other Western societies.

*Id.*

21. "[The prison community] is a world in which 'male' no longer simply connotes certain anatomical characteristics. As in many all-male groups, manliness becomes a status continuum. One's place in the continuum is of great importance, and may be determined by demonstrations of

The coerced proximity of whites and blacks breeds "hate and distrust."[23] Prison architecture often minimizes defensible space, making inmate-on-inmate attacks difficult to detect.[24] Finally, victimization itself and the fear thereof breed violence in the form of retaliation or preemptive attacks.[25]

Whereas the deprivation of security exposes inmates to victimization, the deprivation of liberty closes off retreat by restricting freedom of movement within the institution.[26] Most targets will refuse offers of protective custody[27] because it

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'toughness' during the first weeks of confinement." John J. Gibbs, *Violence in Prison: Its Extent, Nature, and Consequences, in* CRITICAL ISSUES IN CORRECTIONS 110, 115 (Roy R. Roberg et al. eds., 1981). Irwin suggests that the value placed on toughness originates in lower-class culture. He implies that toughness was first seen among state-raised youth, who introduced this value to adult prisons upon their subsequent adult convictions. IRWIN, *supra* note 18, at 29-32. *See also* MARK S. FLEISHER, WAREHOUSING VIOLENCE 198 (1989) (aggressors acquired status, prestige and "macho-value").

22. POLICE, PRISONS, *supra* note 14, at 57-61; Lee H. Bowker, *An Essay on Prison Violence, in* PRISON VIOLENCE IN AMERICA 7, 8-9, 159 (Michael C. Braswell et al. eds., 1985).

23. JOHN IRWIN, PRISONS IN TURMOIL 183 (1980). *See* JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 87 (1983) (conflict is a fact of life in prison). Prison rape is often interracial, with African-Americans as aggressors and whites as targets. LOCKWOOD, *supra* note 7, at 29 (80% of aggressors African-American); LEO CARROLL, HACKS, BLACKS, AND CONS 182 (1974) (75% of aggressors African-American); WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS 60 (1982) (black aggressors and white victims in a majority of rapes).

24. Edith E. Flynn, *The Ecology of Prison Violence, in* PRISON VIOLENCE 110, 123 (Albert K. Cohen et al. eds., 1976) ("The lack of visibility and the long distances involved often make it impossible to identify those responsible for assault or other deviant behavior . . . . Correctional architecture and environments in this sense become breeding grounds for violence, anti-social, and criminal behavior . . . ."); William G. Nagel, *Prison Architecture and Prison Violence, in* PRISON VIOLENCE 105, 108 (Albert K. Cohen et al. eds., 1976) ("Their designs do not provide the internal security to protect [prisoners] . . . .").

25. TOCH, *supra* note 7, at 64 ("One here buys the assumption that violence is the only way of countering or preventing the violence of others."); *Victimizers and Victims*, *supra* note 3, at 64 ("Prisoners who achieve notoriety as fighters are much less likely to be attacked than those who appear to fear overt conflict.").

26. Sykes spoke of the deprivation of liberty as "the most obvious" pain of imprisonment and a "double one" in that an inmate is neither free to leave prison nor to move about within prison. SYKES, *supra* note 9, at 65.

27. Protective custody is a "form of segregated confinement intended to provide enhanced safety for likely targets of inmate violence." James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 91 (1987). Some prisons do not permit inmates to enter protective custody at will because demand outstrips available space and the stigma attached to inmates housed in protective custody hampers their reintegration into the general population at a future date. *Id.* at 92-93. Prison staff may require inmates wanting protective custody housing to name their putative assailants as a condition of admission. *See* WEISS & FRIAR, *supra* note 3, at 5:

Green is asked to name his rapists. Apologetically, he refuses, frightened for his life.

results in their round-the-clock segregation[28] and accords them "non-men" status.[29] In the face of danger, some will instead choose to become "kids" or "punks," exchanging protection for sex.[30] Most inmates, however, will arm themselves with "shanks" in preparation for battle.[31] To "make it" in prison—to be a "standup guy"—requires one to embrace intimidation and violence as operative principles of everyday life.[32]

Targeted inmates often initiate physical violence as a preemptive measure. Daniel Lockwood found that they attacked first in about half of all sexual approaches.[33] He provided the following illustration:

> Cornered, his back against the wall, the target starts the fight (i.e., by shoving the aggressor) - only after his antagonist has repeatedly propositioned him, threatened him, and attempted to whisper

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> He is curtly told that if he doesn't give names nothing can be done for him. They plan to send him back to the same cell. While still in the hospital, Green spends hours of agonized thought over whether to release the names. The guards must realize what will happen to him if he does . . . . No names, he decides.

Staff also discourage inmates from entering protective custody by telling them that parole boards question whether inmates who cannot cope with the general prison population can successfully live in the free community. TOCH, *supra* note 7, at 221.

28. Conditions in protective custody often resemble those of disciplinary segregation, such as isolation, lack of programming, and limited visitation and recreation opportunities. Robertson, *supra* note 27, at 125 & n.219.

29. TOCH, *supra* note 7, at 223 ("'weak' persons (nonmen)"). Furthermore, some inmates presume that anyone in protective custody may be an informer, i.e., a "rat" or "snitch." WEISS & FRIAR, *supra* note 3, at 23 (After being advised to enter protective custody, a raped inmate "gasps at this proposal . . . . It will brand him a rat and informer. His life will become virtually worthless."). *See generally* RICHARD A. MCGEE ET AL., THE SPECIAL MANAGEMENT INMATE 31-52 (1985) (discussing approaches for protecting the growing number of vulnerable inmates).

30. In the prison caste system, a "kid" or a "punk" is a heterosexual prisoner who has been "turned out," that is, coerced into homosexual behavior. WOODEN & PARKER, *supra* note 23, at 3; Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. SOC. L. 135, 139 (1992). Unlike the "punk," a "pitcher" is a sexual aggressor who plays the masculine role in prison sexual relationships. *Id.* at 139. Homosexuality in prison is often a ritualized form of heterosexual acts, with a dominant member assuming a "male" role and a submissive inmate placed in the "female" role. WOODEN & PARKER, *supra* note 23, at 14-18.

31. "Shanks" are knives fashioned by inmates. A network of inmates is involved in the making, smuggling, and buying of weapons. Assignment to a work crew gives inmates access to lawnmower and hacksaw blades, pipes, and other weapons-grade materials, which are passed on to other inmates for transportation to cellblocks for use on fellow inmates. FLEISHER, *supra* note 21, at 143.

32. A "standup guy" is an inmate who is at the top of the prison caste system by virtue of his ability to successfully cope with the hardships of imprisonment. Increasingly, this requires a willingness to use violence. Dumond, *supra* note 30, at 139.

33. LOCKWOOD, *supra* note 7, at 40.

> endearments in his ear. Because the prison restricts movement, the transaction escalates to violence, even though one of the participants wants to retreat.[34]

Indeed, target-initiated violence is the normative response among inmates to homosexual propositions. Not only does it announce your masculinity to a prison community that associates a willingness to fight with manliness, but it also demonstrates adherence to an inmate code that equates private justice with displays of force.[35]

Correctional officers also view target-initiated violence as a legitimate form of self-defense.[36] One inmate recounted:

> I asked Sergent [sic] Brown. And he told me to go ahead, "Pick up the nearest thing around you and hit him in the head with it. He won't bother you no more." I went over to another sergeant and I asked him and he said, "Pick up the nearest damn thing to you and just hit him with it, that is all." I looked at him and I said, "All right. If I do this I ain't going to get locked up for it, am I?" He looks at me and he says, "No." Because I am using self-defense.[37]

Furthermore, target violence is an efficacious survival strategy. In addition to fending off predators,[38] it can transform the vulnerable inmate's prison identity—from being "unmanly," and thus an appropriate target, to someone "sport[ing] the stigmata of manliness."[39]

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34. *Id.* at 42.

35. *Id.* at 52 ("The target's violent response is an explicit normative expectation of the prison community. This is passed on to new men by experienced inmates as part of the process of 'prisonization.'"); TOCH, *supra* note 7, at 207 ("The prevailing norm calls for displays of weapons or preemptive strikes.").

36. PRISON VICTIMIZATION, *supra* note 2, at 13 (some officers "just tell them to fight it out"); LOCKWOOD, *supra* note 7, at 55 ("Prison records show staff pleased with such advice, convinced of it effectiveness."); SILBERMAN, *supra* note 2, at 19 ("correctional officers frequently lend support to such aggressive responses"); TOCH, *supra* note 7, at 208 ("Custodial officers may advise inmates of the advantages of using violence when one is threatened."); WEISS & FRIAR, *supra* note 3, at 25 (Another inmate is advised by a staff member to "Go back . . . and fight it out.").

37. LOCKWOOD, *supra* note 7, at 55-56.

38. In the sole published study of the effectiveness of target violence, Lockwood concluded: "In concrete incidents, some men have found violence to be a satisfactory ploy. Targets can report violent responses that have curbed aggressive approaches, and some men who try reasoning with aggressors find them unresponsive until these targets project a more aggressive stance." *Id.* at 50. Threats by targets are also effective. Lockwood noted that target threats ended half the confrontations he studied, whereas passive responses led to aggressor violence or aggressor threats. *Id.* at 43.

39. TOCH, *supra* note 7, at 214; LOCKWOOD, *supra* note 7, at 43.

## II. THE EXTANT LAW OF SELF-DEFENSE IN PRISON

### *A. An Overview of Prison Discipline*

Inmates are subject to a plethora of prison rules designed to regulate virtually every aspect of daily life.[40] For instance, Wisconsin's disciplinary code is divided into the following categories of prohibited behavior: 1) bodily security (e.g., assault); 2) institutional security (e.g., inciting a riot); 3) institutional order (e.g., disrespect); 4) property (e.g., theft); 5) contraband (e.g., possession of money); 6) movement (e.g., loitering); 7) safety and health (e.g., dirty quarters); and 8) miscellaneous (e.g., refusal to work).[41] Some of these prohibitions are *malum in se* and mirror criminal offenses.[42] But the great bulk of prohibitions have no counterpart in the criminal law[43] and are peculiar to life in "total institutions," where prisoners are stripped of their autonomy and subjected to round-the-clock surveillance.[44]

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40. The median number of prison rules is 56. New York lists the most (105 rules) while Massachusetts possesses the fewest (33 rules). James E. Robertson, *"Catchall" Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 169-70 (1994).

41. WIS. ADMIN. CODE § DOC 303 (June 1994).

42. *See, e.g.*, ARKANSAS DEP'T OF CORRECTION, ADMIN. REG. § 831, at 6-8 (May 17, 1990) (battery, rape, assault); GEORGIA DEP'T OF CORRECTIONS, INMATE DISCIPLINARY CODE, at 1-2 (March 1, 1992) (intentional killing of officer; intentional bodily injury to prison employee; threatening person with weapon; assault without a weapon); KENTUCKY DEP'T OF CORRECTIONS, POLICIES AND PROCEDURES 15.2, at 6 (Sept. 1, 1992) (assaulting inmate, extortion or blackmail, destroying property, bribery); MARYLAND DIV. OF CORRECTION, DCD NO. 105-1, at 2-3 (Nov. 1, 1992) (wrongful killing, battery, extortion, bribery, stealing); STATE OF NEW YORK DEP'T OF CORRECTIONAL SERVICES, STANDARDS OF INMATE BEHAVIOR, ALL INSTITUTIONS 9 (rev. Feb. 1992) (inflicting bodily harm upon inmate, making threats, extortion); NORTH CAROLINA DEP'T OF CORRECTIONS, RULES AND POLICIES 20 (Dec. 1988) (murder, assault, kidnaping, arson, stealing); WASH. ADMIN. CODE § 137-28-030 (1990) (homicide, assault, extortion, stealing).

43. ARKANSAS DEP'T OF CORRECTION ADMIN. REG. § 831, at 3-5 (May 17, 1990) (writing petition that poses threat to prison security, getting fired, interfering with count, breaking into inmate line); COLORADO DEP'T OF CORRECTIONS, CODE OF PENAL DISCIPLINE 15-19 (rev. 1984) (abuse of medication, refusal, bartering, unauthorized absence); HAWAII DEP'T OF SOCIAL SERVICES AND HOUSING, INMATE HANDBOOK 8 (Oct. 1983) (engaging in sexual acts, wearing mask, loaning of property for profit, refusing to obey an order); KANSAS DEP'T OF CORRECTIONS, INMATE RULE BOOK 14-15 (April 20, 1992) (insubordination, avoiding an officer, improper use of food, misconduct in dining room); MARYLAND DIV. OF CORRECTION, DCD No. 105-1, at 2-3 (Nov. 1, 1991) (consensual sexual act, possession of money, giving false information about institutional matters, refusal to work); WASH. ADMIN. CODE § 137-28-025 (1990) (loaning for profit, refusal to obey, unexpected absence from work, lying to staff, tattooing).

44. ERVING GOFFMAN, ASYLUMS 6 (1961):

> The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating these three spheres of life. First, all aspects of life are conducted

A Bureau of Criminal Justice Statistics survey of state prison inmates found that 52.7% were accused of disciplinary offenses during the course of their confinement.[45] Male inmates averaged two violations per year.[46] A greater percentage of non-Hispanic blacks (57%) faced disciplinary charges than non-Hispanic whites (51%) and Hispanics (47%).[47] Younger inmates had the most disciplinary violations.[48]

The actual rate of misconduct is much higher. Many targets do not report their victimization out of fear of being labeled a "rat" by their fellow inmates.[49] Furthermore, correctional officers frequently overlook violations, even serious ones.[50] Whether they "write-up" an inmate for a rule violation is influenced by several factors, including the nature and severity of the infraction[51] as well as the race and disciplinary record of the offender.[52]

The Supreme Court has held that accused inmates are entitled to a hearing and several attendant procedural safeguards:

1) Prison staff must provide them written notification of the alleged offense and a summary of the factual basis of the accusation no later than twenty-four hours before the hearing.[53]

2) Inmates who are illiterate or facing complex charges are entitled to a "counsel substitute," who is typically a member of the prison staff.[54]

3) While there is no right of cross-examination, inmates may advance their

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> in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled. . . . Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.

45. JAMES STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RULE VIOLATORS 1, tbl. 1 (1989).

46. *Id.*

47. *Id.* at 2-3.

48. *Id.* at 2.

49. SYKES, *supra* note 9, at 87, noting that:

> [I]n the prison the word *rat* or *squealer* carries an emotional significance far greater than that usually encountered in the free community. The name is never applied lightly as a joking insult . . . . Instead, it represents the most serious accusation that one inmate can level against another, for it implies a betrayal that transcends the specific act of disclosure. The *rat* is a man who has betrayed not just one inmate or several; he has betrayed inmates in general . . . .

50. Hewitt et al., *supra* note 12, at 445.

51. *Id.*

52. Erick D. Poole & Robert M. Regoli, *Race, Institutional Rule-Breaking, and Institutional Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC'Y REV. 931, 942-46 (1980).

53. Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974).

54. *Id.* at 570.

case through the testimony of relevant witnesses unless their presence would be "unduly hazardous to institutional safety or correctional goals."[55]

4) The hearing body must provide the accused inmate with a written explanation of its verdict.[56]

All but ten percent of disciplinary cases end with guilty findings.[57] The hearing body can impose a variety of sanctions upon the guilty. Solitary confinement is the most common sanction (31% of rule violators), followed by forfeiture of good conduct time (25%), denial of entertainment and recreational opportunities (15%), and loss of commissary privileges (13%).[58] The hearing body possesses extensive discretion in choosing the nature and severity of disciplinary sanctions.[59]

### *B. A Survey of the State Practices*

Targeted inmates who engage in self-defense may find themselves charged with disciplinary infractions such as assault, battery, and/or possession of weapons. John Rowe, an inmate at the Indiana Reformatory at Pendleton, bears witness to the ensuing hardships. He hit inmate Michael Evans over the head with a hot pot after Evans had entered his cell and allegedly attempted to rape him.[60] Earlier, Evans had threatened to harm Rowe unless he submitted to sexual acts.[61] Charged with violating a prison rule that prohibited battery, Rowe asserted his innocence on the grounds that he acted in self-defense.[62] The disciplinary committee found Rowe guilty of battery after concluding that the Indiana Department of Corrections recognizes self-defense as a mitigating factor but not

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55. *Id.* at 566.

56. *Id.* at 564.

57. STEPHAN, *supra* note 45, at 1.

58. *Id.* at 6-7.

59. The penalty schedule adopted by Maine is illustrative. There are four levels of offense severity. The most severe level, Class A Disposition, provides:

1. Disciplinary segregation or cell restriction or both, up to a total of 30 days.
2. Housing or room/dorm restriction or both, up to a total of 30 days.
3. Loss of good time, up to 30 days.
4. Loss of privileges for no more than 30 days.
5. Recommend changes in program to Classification Committee to include, but not be limited to, school/housing, work/community programs.
6. Restitution.
7. Counseling/verbal reprimand/warning.
8. Any combination of the above.

MAINE DEP'T OF CORRECTIONS POLICY, CLIENT DISCIPLINARY PROCEDURES ch. 15.1, at 14 (March 1, 1991).

60. Rowe v. DeBruyn, 117 F.3d 1047, 1048 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 508 (1994).

61. *Id.* at 1049.

62. *Id.*

as a complete defense in disciplinary matters.[63]

Although Rowe's actions were normative among inmates and guards, the departments of corrections of only twelve states have written policies acknowledging self-defense as grounds for acquittal of certain disciplinary charges.[64] Seven of the twelve states stipulate that self-defense excuses only instances of fighting and/or assault.[65] None of these seven states provide inmates and/or hearing officers with an operational definition of self-defense. Five states, Michigan, Ohio, Wisconsin, Utah, and New Mexico, delineate by statute or administrative regulation the elements of self-defense and excuse any offense embraced by their operational definitions.[66] Michigan's *Hearings Handbook*

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63. *Id.*

64. ALABAMA DEP'T OF CORRECTIONS, ADMIN. REG. NO. 403, DISCIPLINARY HEARING PROCEDURES FOR MAJOR AND MINOR VIOLATIONS 18 (June 17, 1992) (fighting defined as mutual combat); COLORADO DEP'T OF CORRECTIONS, CODE OF PENAL DISCIPLINE 9, 14 (rev. ed. 1984); KAN. ADMIN. REGS. 44-12-301 (Supp. 1992); LOUISIANA DEP'T OF PUBLIC SAFETY AND CORRECTIONS, DISCIPLINARY RULES AND PROCEDURES FOR ADULT PRISONERS 14 (Feb. 5, 1986); MICHIGAN DEPT. OF CORRECTION, HEARINGS HANDBOOK 33 (1994) (a copy of page 33 was enclosed in letter from Richard B. Stapleton, Hearings Administrator, Office of Policy and Hearings, Mich. Dep't of Corrections, to the author (Dec. 21, 1994)); MISSISSIPPI DEP'T OF CORRECTIONS, INMATE HANDBOOK 13 (1992); Letter from Celedonio Vigil, Acting Director, Adult Prisons Division, N.M. Corrections Dep't., to the author (Jan. 4, 1995) (enclosed with the letter were New Mexico's inmate discipline procedures, including offenses and sanctions); OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993); UTAH CODE ANN. § 76-2-402 (1995) (enclosed in letter from Jack Ford, Director, Constituent Services, Utah Dep't of Corrections, to the author (June 21, 1995)); VIRGINIA DEPT. OF CORRECTIONS, DIVISION OPERATING PROCEDURE 861, INMATE DISCIPLINE 4 (April 1, 1992); WASH. ADMIN. CODE § 137-28-030 (1990); WIS. ADMIN. CODE § DOC 303.05 (June 1994).

65. ALABAMA DEP'T OF CORRECTIONS ADMIN. REG. NO. 403, DISCIPLINARY HEARING PROCEDURES FOR MAJOR AND MINOR VIOLATIONS 18 (June 17, 1992) (fighting defined as mutual combat); COLORADO DEP'T OF CORRECTIONS, CODE OF PENAL DISCIPLINE 9, 14 (rev. ed. 1984) ("Self-defense shall be a defense to the charge of assault."); KAN. ADMIN. REGS. 44-12-301 (Supp. 1992) ("unless such activity [fighting] is in self-defense"); LOUISIANA DEP'T OF PUBLIC SAFETY AND CORRECTIONS, DISCIPLINARY RULES AND PROCEDURES FOR ADULT PRISONERS 14 (Feb. 5, 1986) ("Self-defense is a complete defense [to aggravated fighting] and can be established to the Board by demonstrating that his actions did not exceed those necessary to protect himself from injury."); MISSISSIPPI DEP'T OF CORRECTIONS, INMATE HANDBOOK 13 (1992) ("Fighting with another person except in self-defense."); VIRGINIA DEPT. OF CORRECTIONS, DIVISION OPERATING PROCEDURE 861, INMATE DISCIPLINE 4 (April 1, 1992) ("[T]his offense [assault] shall apply only to the inmate who attacks or initiates the actual physical combat."); WASH. ADMIN. CODE § 137-28-030 (1990) ("[f]ighting with any person except in self-defense").

66. MICHIGAN DEP'T OF CORRECTIONS, HEARINGS HANDBOOK 33 (1994); Letter from Celedonio Vigil, Acting Director, Adult Prisons Division, N.M. Corrections Dep't., to the author (Jan. 4, 1995); OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993); UTAH CODE ANN. § 76-2-402 (1995); WIS. ADMIN. CODE § DOC 303.05 (June 1994).

operationalizes self-defense by specifying six elements that the hearing officer must consider before excusing the defendant's conduct:

> 1. The resident must have had physical force used against him/her, or reasonably believed that the use of physical force against him/her was imminent.
> 2. The resident claiming the defense was not the original aggressor.
> 3. The resident did not provoke the attacker.
> 4. The use of force was not by mutual agreement.
> 5. The resident had no reasonable alternative to the use of force in defending his/her physical well-being (e.g., retreat was not a possible alternative).
> 6. The resident did not use more force than was reasonably necessary to defend self (if [the] resident fought back harder than necessary, s/he should be found guilty of fighting).[67]

The *Hearings Handbook* also stipulates that "this defense is not available to protect property or 'honor,' but only the physical well being of residents."[68] Ohio's treatment of self-defense is quite similar to that of Michigan.[69] Wisconsin's self-defense provisions are distinguished by the requirement that the target not use a weapon.[70] Utah is alone in applying a statutory provision for self-

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67. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994).

68. *Id.*

69. OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993):

> Self defense: An inmate acting in self-defense does not have the required intent to be found guilty of a fighting charge (77-17, 85-43). Where self-defense is asserted, the RIB must closely examine the incident to determine whether the force used by the inmate in defending himself was reasonable (76-39, 85-43). Reasonable force is limited to that force necessary to defend against or repel a physical attack to avoid injury; any force that goes beyond this amount constitutes supporting or perpetuating a fight (80-2, 85-43, 88-8). An inmate is entitled to continue to defend himself as long as the circumstances justify, but if possible he must retreat (77-6).

70. WIS. ADMIN. CODE § DOC 303.05 (4) (June 1994):

> An inmate may use the minimum amount of force necessary to prevent death or bodily injury to himself or herself. An inmate may never use force which may cause death to another in exercising the privilege of self-defense. An inmate may never use a weapon in exercising the privilege of self-defense. An inmate may not continue to exercise the privilege of self-defense after an order to stop. In determining whether the minimum amount of force was used in exercising the privilege of self-defense, staff should consider:
>
> (a) Whether a weapon was used by the aggressor;
> (b) The size of the inmates;
> (c) The opportunity of an inmate who claims self-defense to flee or get assistance from a staff member; and
> (d) Whether staff members were nearby.

defense.[71] New Mexico, on the other hand, considers self-defense to be a species of duress, which constitutes a defense to disciplinary charges.[72]

In twenty-one additional states, hearing officers as a matter of customary practice can acquit targeted inmates on the grounds of self-defense.[73] For instance,

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71. UTAH CODE ANN. § 76-2-402 (1995), which provides in part:

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, to prevent the commission of a forcible felony.

(2) A person is not justified in using force under the circumstances specified in Subsection (1) if he or she:

(a) initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(b) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(c)(i) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person threatens to continue the use of unlawful force.

72. Letter from Celedonio Vigil, Acting Director, Adult Prisons Division, N.M. Corrections Dep't., to the author (Jan. 4, 1995) ("Facts establishing that a prisoner committed an offense while acting under duress may be raised by a prisoner and shall be considered where appropriate as a defense to, or in mitigation of any sanctions for, any offense . . . .").

73. Letter from J.C. Kenney, Assistant Director, Adult Institutions, Ariz. Dep't of Corrections, to the author (Jan. 4, 1995) (self-defense permitted when in immediate physical danger and minimal amount of force used); Letter from Steve Crawford, Program Administrator, Institution Services Unit, Cal. Dep't of Corrections, to the author (July 11, 1995) (California Code of Regulations and Department Operations Manual do not address self-defense, but inmate can provide evidence, including self-defense and may secure dismissal or reduction of offense severity if there is a belief in the inmate's innocence); Letter from Barry Faticoni, Administrator, Standards and Policy Unit, Conn. Dep't of Correction, to the author (Dec. 20, 1994) (self-defense could lead to an acquittal); Letter from Perri King Dale, Fla. Dep't of Corrections, to the author (July 17, 1995) (self-defense can result in dismissal or mitigation); Letter from Karen M. Kirk, Senior Public Information Specialist, Ga. Dep't of Corrections, to the author (June 26, 1995) (no written procedures, but self-defense considered in hearings); ILLINOIS DEP'T OF CORRECTIONS RULES, ch. 20, pt. 504A, § 504.80, at 9 (The inmate can make a "relevant statement . . . in his defense.") (attachment to letter from David M. Boots, Manager, Planning and Research Unit, Ill. Dep't of Corrections, to the author (Dec. 16, 1994)); Letter from Sally Chandler Halford, Director, Iowa Dep't of Corrections, to the author (Aug. 28, 1995) (no specific self-defense policy, but can be considered in disciplinary hearing); Letter from Susan Alley, Staff Attorney, Ky. Dep't of Corrections, to the author (Dec. 15, 1994) (policies do not specifically address defenses, but may raise self-defense as an excuse or in mitigation); Telephone interview with Audrey Brown, Office

although the Arizona Department of Corrections lacks a written self-defense policy, a spokesperson recounted that:

> We believe that self-defense is justified when a person is in immediate physical danger and uses only a minimal amount of force to protect himself. In essence, we apply the same standard used in the community. It is my experience that many times we find one inmate guilty of fighting and the other not guilty due to self-defense.[74]

No fewer than nine of the aforementioned states extend hearing officers the

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of the Commissioner, Md. Dep't of Corrections (Aug. 10, 1995) (no written policy but hearing officers will hear pleas of self-defense on a case-by-case basis); Letter from Joanne M. Sollecito, Legal Counsel, Mass. Dep't of Correction, to the author (July 13, 1995) (regulations do not address self-defense but in practice is considered on a case-by-case basis); Letter from Mark D. Thielen, Assistant to Deputy Commissioner, Institutions Division, Minn. Dep't of Corrections, to the author (Dec. 28, 1994) (supervisor of hearing officers stated that no specific policies address what defenses may be raised and can pretty much raise what you want; not uncommon to raise self-defense in cases of inmate-on-inmate violence and once in great while is justified and is sometimes used to mitigate a penalty); Letter from Bonita G. Morrow, Administrative Analyst, Mo. Dep't of Corrections, to the author (June 22, 1995) (procedures do not specifically provide for self-defense but is an important consideration in fights and violence); Letter from David L. Ohler, Legal Counsel, Mont. Dep't of Corrections and Human Services, to the author (July 6, 1995) (policy does not speak to self-defense, but may be raised as an excuse; accepted only when evidence is clear and convincing); Letter from George Green, General Counsel, Neb. Dep't of Correctional Services, to the author (Dec. 21, 1994) (regulations do not provide for self-defense to be excuse or complete defense, but as a practical matter, self-defense is frequently raised and "I am reluctant to assign total blame," and if record does not show that inmate voluntarily engaged in each element of offense as required by regulations, my inclination is to dismiss charges); Letter from B.J. Urbaniak, Special Assistant to the Commissioner, N.J. Dep't of Corrections, to the author (Dec. 29, 1994) ("disciplinary charge can be downgraded or dismissed"); Letter from Philip Coombe, Jr., Acting Commissioner, N.Y. Dep't of Correctional Services, to the author (Dec. 29, 1994) (no specific policy regarding self-defense, but we believe that the inmate may raise that defense); Letter from Don Redman, Director of Training and Accreditation, N.D. State Penitentiary, to the author (Jan. 24, 1995) (no formal policy but do accept self-defense as "legitimate factor in the hearing process"); Letter from John S. Foote, Inspector General, Or. Dep't of Corrections, to the author (June 20, 1995) (self-defense constitutes a complete defense but agency lacks a definition of self-defense); Letter from Darwin Weeldreyer, Policy Analyst, S.D. Dep't of Corrections, to the author (July 7, 1995) (the hearing officer has discretion to accept a plea of self-defense); Letter from Wayne Scott, Director, Tex. Dep't of Criminal Justice-Institutional Division, to the author (Dec. 16, 1994) (no written policy regarding self-defense, but "[w]e maintain that every person has a right to protect themself [sic] from harm; however, the zealousness of one's defense can also become an issue"); Letter from Robert G. Casto, Staff Assistant, W. Va. Div. of Corrections, to the author (June 27, 1995) (no written policy but may raise self-defense when fight or assault occurs).

74. Letter from J.C. Kenney, Assistant Director, Adult Institutions, Ariz. Dep't of Corrections, to the author (Jan. 4, 1995).

authority to mitigate disciplinary sanctions when self-defense is at issue.[75] The corrections departments of six additional states treat self-defense solely as a mitigating circumstance when imposing punishment.[76] The remaining states give no indication via their administrative rules or in response to the author's queries whether they consider self-defense to be either a complete defense or a mitigating factor in passing sentence.[77] Given that hearing officers have considerable

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75. Letter from Steve Crawford, Program Administrator, Institution Services Unit, Cal. Dep't of Corrections, to the author (July 11, 1995) (self-defense can result in dismissal or reduced penalty); Letter from Barry Faticoni, Administrator, Standards and Policy Unit, Conn. Dep't of Correction, to the author (Dec. 10, 1994) (administrative directive provides for mitigation of penalty, but does not preclude dismissal on grounds of self-defense); Letter from Perri King Dale, Fla. Dep't of Corrections, to the author (July 17, 1995) (self-defense can result in dismissal or mitigation); Letter from Joanne M. Sollecito, Legal Counsel, Mass. Dep't of Correction, to the author (July 13, 1995) (although no written policies address self-defense, it can be considered a viable defense or a mitigating factor on a case-by-case basis); Letter from Mark D. Thielen, Assistant to Deputy Commissioner, Institutions Division, Minn. Dep't of Corrections, to the author (Dec. 28, 1994) (no specific policies addressing what defenses may be raised, but self-defense on rare occasion can excuse or mitigate a penalty); Letter from B.J. Urbaniak, Special Assistant to the Commissioner, N.J. Dep't of Corrections, to the author (Dec. 29, 1994) ("disciplinary charge could be downgraded or dismissed"); Letter from Celedonio Vigil, Acting Director, Adult Prisons Divisions, N.M. Corrections Dep't., to the author (Jan. 4, 1995) ("duress [which includes self-defense] . . . shall be considered where appropriate as a defense to, or in mitigation of any sanctions . . . ."); Letter from Philip Coombe, Jr., Acting Commissioner, N.Y. Dep't of Correctional Services, to the author (Dec. 29, 1994) (no specific policy regarding self-defense, but hearing officer has responsibility for determining whether to dismiss charges or mitigate the penalty); Letter from Wayne Scott, Director, Tex. Dep't of Criminal Justice—Institutional Division, to the author (Dec. 16, 1994) (self-defense is a "valid defense" and "is valid in the mitigation phase"). It appears that hearing officers in the departments cited above have extensive discretion in choosing when to mitigate sanctions as opposed to an outright dismissal of the charges.

76. Letter from Eric Penarosa, Deputy Director for Corrections, Haw. Dep't of Public Safety, to the author (Dec. 16, 1994) (no formal policy but department has rules prohibiting fighting; adjustment committee does not consider self-defense to be an excuse but can mitigate the sanction); Letter from James D. Dimitri, Staff Counsel, Ind. Dep't of Corrections, to the author (Jan. 9, 1995) (The department does not permit self-defense to be complete defense but can be mitigating concern. For example, if one pleads self-defense, s/he may receive 10 days of segregation as opposed to the normal 30 days.); Letter from Hattie B. Pinpong, Chief Disciplinary Hearing Officer, N.C. Dep't of Correction, to the author (Jan. 20, 1995) ("Self-defense can be a mitigating factor."); Letter from Office of the Commissioner, N.H. Dep't of Corrections, to the author (July 19, 1995) (no department rules but can only be a mitigating factor); Letter from Robert S. Bitner, Chief Hearing Examiner, Pa. Dep't of Corrections, to the author (Jan. 18, 1995) (self-defense not an absolute defense, but can be considered a mitigating factor); Letter from William R. Anderson, Hearings Administrator, Vt. Dep't of Corrections, to the author (Sept. 6, 1995) (no self-defense doctrine in the states' disciplinary rules, but officers can consider it a mitigating factor in assault or fighting cases).

77. ALASKA ADMIN. CODE tit. 22, §§ 05.400 - 05.480 (Jan. 1990) (attached to Letter from

discretion in selecting disciplinary punishments,[78] it would seem likely that self-defense arguments affect their verdicts and/or choice of sanctions despite the absence of relevant policy or acknowledged custom.

### *C. Rowe v. DeBruyn*

Prior to the late 1960s, federal courts adhered to the "hands-off" doctrine, which precluded their involvement in disputes between inmates and staff.[79] Prison

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D.W. Carothers, Superintendent, Alaska Dep't of Corrections, to the author (Feb. 26, 1993)) (no provision for self-defense); ARKANSAS DEP'T OF CORRECTIONS, ADMIN. REG. § 831, at 6-8 (May 17, 1990) (no provision for self-defense); DELAWARE DEP'T OF CORRECTION, BUREAU OF PRISONS, POLICY NO. 4.2 (Feb. 1, 1991) (no provision for self-defense); IDAHO DEP'T OF CORRECTION, POLICY AND PROCEDURE MANUAL § 318-C (Sept. 25, 1990) (no provision for self-defense); Letter from Francis J. Westrack, Director of Classification, Me. Dep't of Corrections, to the author (June 26, 1995) (no policy regarding self-defense that permits prisoners to be excused); NEVADA DEP'T OF PRISONS, CODE OF PENAL DISCIPLINE (May 1, 1993); Letter from Debbie Boyer, Administrator, Office of Technology and Procedures, Okla. Dep't of Corrections, to the author (Dec. 15, 1994) (self-defense not specifically addressed in Policy and Operations Manual); RHODE ISLAND DEP'T OF CORRECTIONS, PETTINE RULES (1972) (no provisions for self-defense); SOUTH CAROLINA DEP'T OF CORRECTIONS, INMATE DISCIPLINARY HEARINGS (July 29, 1994) (no provisions for self-defense); TENNESSEE DEP'T OF CORRECTION, UNIFORM DISCIPLINARY PROCEDURES (July 15, 1993) (no provision for self-defense); WYOMING STATE PENITENTIARY, INMATE RULES HANDBOOK, ch. 30 (1990) (no provisions for self-defense).

78. *See supra* note 59 (illustrating discretionary powers given hearing officers in selecting sanctions). *See also* Steven Gifis, *Decision-Making in a Prison Community, in* THE INVISIBLE JUSTICE SYSTEM 317, 326 (Burton Atkins & Mark Pogrebin eds., 1978) (sanctioning influenced by circumstances surrounding the infraction, the attitude of the accused, and disciplinary records).

79. *See, e.g.,* Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy in . . . discipline [and other matters] . . . ."); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("courts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases."); United States v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964) ("Except under exceptional circumstances, internal matters, in state penitentiaries, are the sole concerns of the state, and federal courts will not inquire concerning them."); Kostal v. Tinsley, 337 F.2d 845, 846 (10th Cir. 1964) ("The discretion of the prison officials on matters purely of discipline . . . is not open to review."); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("courts have no supervisory jurisdiction over the conduct of the various institutions"); Sarshik v. Sanford, 142 F.2d 676, 676 (5th Cir. 1944) ("The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there."); United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) ("it is unthinkable that the judiciary should take over the operation of . . . prisons"); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 507 (1963) ("hands-off" doctrine left inmates "without enforceable rights"); Martin W. Spector, Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986-87 (1962) ("courts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the

discipline was often arbitrary and capricious, yet inmates had no effective judicial recourse.[80] Since the demise of the "hands-off" doctrine, inmates have initiated lawsuits on scores of subjects,[81] but until the 1994 decision in *Rowe v. DeBruyn*[82] federal courts had yet to explicitly address the constitutional status of self-defense as an answer to disciplinary charges.[83]

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extreme situation").

80. TODD R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 385 (2d ed. 1990) ("[P]unishment was at the full discretion of the warden and inmates had no opportunity to challenge the charges."); Bruce R. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. C.R.-C.L. L. REV. 227, 244 (1970) ("[t]he almost complete absence of meaningful procedural protections . . . [in some prisons]"); William D. Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D. L. REV. 309, 314 (1973). ("Even if procedures exist, and even if they are followed, the prisoner's chances of receiving a fair hearing are extremely poor. In many instances, a hearing is never held and punishment is imposed by an individual guard.").

81. Several developments led to the demise of the "hands-off" doctrine and the expansion of prisoners' rights: 1) inmates vigorously sought recognition of their rights; 2) the emergence of a prisoners' rights bar; 3) prison disturbances focused public attention on prison problems; and 4) courts became more committed to protecting the rights of disfavored groups. SHELDON KRANTZ & LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 267 (4th ed. 1991). The expansion of prisoners' rights has been documented by several commentators. *See, e.g.*, Note, *Eighth Amendment Challenges to Conditions of Confinement: State Prison Reform by Judicial Decree*, 18 WASHBURN L.J. 288 (1979); Michael S. Feldberg, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

Beginning in the early 1980s, the Supreme Court brought an end to the expansion of prisoners' rights. *See, e.g.*, Farmer v. Brennan, 114 S. Ct. 1970, 1979-80 (1994) (deliberate indifference represents subjective recklessness on the part of prison officials); Wilson v. Seiter, 501 U.S. 294, 294-300 (1991) (deliberate indifference and deprivation of basic human needs required for Eighth Amendment violations in prisons); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (non-legal publications can be restricted if reasonable basis exists); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987) (religious practices can be restricted if reasonable basis exists); Turner v. Safley, 482 U.S. 78, 91 (1987) (reasonable to ban mail between inmates); Whitley v. Albers, 475 U.S. 312, 320 (1986) (use of force in quelling prison riot not cruel and unusual punishment unless unnecessary and wanton); Block v. Rutherford, 468 U.S. 576, 589 (1984) (no right to contact visits); Hudson v. Palmer, 468 U.S. 517, 527-28 (1984) (no right of privacy in papers and property in prison cell); Rhodes v. Chapman, 452 U.S. 337, 349-50 (1981) (double-celling not inherently unconstitutional).

82. 17 F.3d 1047 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 508 (1994).

83. Two decisions previous to the *Rowe* case tangentially addressed self-defense in prison. In Ward v. Johnson, 667 F.2d 1126 (4th Cir. 1981), the court found that prison officials had erred in not producing inmate witnesses expected to support the plaintiff's assertion that he acted in self-defense in kicking a fellow inmate. *Id.* at 1130-31. In Ivey v. Wilson, 577 F. Supp. 169 (W.D. Ky. 1983), the district court held that an inmate charged with a disciplinary violation stemming from

In *Rowe*, the inmate was found guilty of battery in a disciplinary hearing after Indiana prison officials ruled that self-defense did not excuse disciplinary violations.[84] Inmate Rowe sued under 42 U.S.C. § 1983.[85] The trial court granted prison officials' motion for summary judgment.[86] In his appeal before the United States Court of Appeals for the Seventh Circuit, Rowe averred violations of his substantive and procedural due process rights under the Fourteenth Amendment.

Rowe first contended that inmates accused of disciplinary charges possess a substantive right to be acquitted on grounds of self-defense.[87] The court of appeals responded by finding no basis for such a right. It roundly rejected Rowe's argument that statutory provisions for self-defense in criminal cases somehow created a substantive right protected by the Fourteenth Amendment.[88] Turning to the alternative argument that self-defense is one of those unenumerated fundamental constitutional rights, such as the right to marry[89] and procreate,[90] the court looked for supporting precedent in the criminal law and could find none.[91] The court added that even if there existed a fundamental right to self-defense in criminal cases, the facts of this case concerned prison discipline—"[which is] not part of a criminal prosecution, and the full panoply of rights due a defendant in such a proceeding does not apply."[92]

The court then turned to whether Indiana prison officials had violated Rowe's procedural due process rights by rejecting self-defense as grounds for acquittal. While the court acknowledged that Rowe's right to be heard had been thus limited, prison officials had "accommodated" Rowe by allowing him to raise self-defense as a mitigating factor.[93] "This accommodation of Rowe," wrote the court, "weighed against the . . . [state's] interest in refusing to recognize self-defense as

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an altercation with other inmates was entitled to the production of hospital records to demonstrate that his injuries were consistent with his claim of self-defense. *Id.* at 173. Neither decision, however, addressed whether an inmate has a right of self-defense.

84. *Rowe*, 17 F.3d at 1049.

85. 42 U.S.C. § 1983 (1988). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

86. *Rowe*, 17 F.3d at 1049.

87. *Id.* at 1050-51.

88. *Id.* at 1051-52.

89. Loving v. Virginia, 388 U.S. 1, 12 (1967).

90. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

91. *Rowe*, 17 F.3d at 1052.

92. *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)).

93. *Id.* at 1054.

a complete defense in order to discourage prison violence, allows the self-defense policy to survive constitutional scrutiny."[94]

## III. TARGET SELF-DEFENSE AS A CONSTITUTIONAL RIGHT

### *A. Self-Help Measures in a State of Nature*

While the court in *Rowe v. DeBruyn* considered self-defense to merit the mitigation of disciplinary sanctions, it nonetheless failed to extricate targeted inmates from the dilemma they face in too many states: if they are to prove their manhood in prison and fend off aggressors, targets must resort to self-help measures which transgress prison rules.[95] The court's error came about because it assumed that the constitutional status of self-defense must be diminished by one's imprisonment. Just the opposite is true—the contemporary, Hobbesian prison makes target violence an imperative more worthy of constitutional protection than the exercise of self-defense in civil society. Consequently, this Article argues that certain instances of target violence are constitutionally immune from disciplinary sanctions in those prisons plagued by the routine victimization of inmates by inmates.

Inmates and other residents of "total institutions" possess a "historic liberty interest . . . [in] be[ing] free from . . . unjustified intrusions on personal security,"[96] which the Supreme Court has clothed in terms of the state's obligation to inmates and other institutionalized persons. For instance, in the 1989 decision *DeShaney v. Winnebago County Department of Social Services,*[97] the Court spoke of a duty to provide "reasonable safety [whenever] the . . . [s]tate by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself."[98] Most recently, in its 1994 decision *Farmer v. Brennan,*[99] the Court addressed the application of the Eighth Amendment to a transsexual inmate beaten and raped by other inmates.[100] Writing for the majority, Justice Souter declared that "having stripped . . . [inmates] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."[101]

Despite Justice Souter's admonishment, many prisons have been allowed to degenerate into a world of hate, fear, distrust, and aggression. As one commentator writes, "[Prisons are] a barely controlled jungle where the aggressive

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94. *Id.*

95. *See supra* notes 6, 7 and accompanying text (discussing targeted inmate's dilemma).

96. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

97. 489 U.S. 189 (1989).

98. *Id.* at 200.

99. 114 S. Ct. 1970 (1994).

100. *Id.* at 1975. The Eighth Amendment prohibits, in relevant part, "cruel and unusual punishment." U.S. CONST. amend. VIII.

101. *Farmer*, 114 S. Ct. at 1977.

and strong will exploit the weak, and the weak are dreadfully aware of it."[102] In a civil prison, defensive violence may be unworthy of constitutional protection, but not so in the contemporary prison where predatory inmates dominate institutional life.[103] Because the American prison bears a striking resemblance to a state of nature, target violence becomes a necessary self-help measure for protecting the vulnerable inmate's "historic liberty interest" in bodily integrity.[104] As one commentator observed:

> In the outside world, a person who is verbally or physically harassed can call the police or seek assistance to deter the harasser. In prison, there is no one to call. Consequently, there is little choice but to engage in self-help in the settling of disputes. In prison, self-help is expressed as verbal or physical aggression, threatened or real, in order to maintain "respect."[105]

The foregoing analysis seeks to reconcile constitutional principles with prison folkways regarding self-defense. As we previously observed, both staff and inmates view defensive violence as legitimate and expected when one is targeted for rape or other forms of aggression.[106] Jack Abbott, state-raised inmate, noted author, and convicted murderer, articulated this normative arrangement in declaring: "This is the way it is done. If you are a man, you must either kill or turn the tables on anyone who propositions you with threats of force. It is the *custom* . . . ."[107] While prison folkways are not per se worthy of constitutional protection, when they advance a recognized liberty interest in bodily integrity they ought to find expression in constitutional order as it is applied to prison.

### *B. An Operational Definition of Self-Defense*

Self-defense in prison ought to excuse inmates from disciplinary charges when targets can make a clear and convincing case that their actions were essential. In evaluating such claims, disciplinary hearing officers must utilize an operational definition of self-defense that incorporates established and tested principles which distinguish legitimate defensive force from other species of violent conduct.

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102. PAUL KEVE, PRISON LIFE AND HUMAN WORTH 47 (1974). *See also supra* notes 2-3, 9-25 and accompanying text (examining inmate-on-inmate violence).

103. John Irwin observed that until the 1960s the prevailing prison norms were "tolerance, mutual aid, and loyalty [to other inmates]." IRWIN, *supra* note 23, at 192. Thereafter, these norms gave way to warfare amongst inmates and a "new hero" emerged: "Today the respected public prison figure—the convict or hog—stands ready to kill to protect himself, maintains strong loyalties to some small group of other convicts (invariably of his own race), and will rob and attack or at least tolerate his friends' robbing and attacking . . . ." *Id.* at 195.

104. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

105. SILBERMAN, *supra* note 2, at 75.

106. *See supra* notes 35-37 and accompanying text (discussing normative basis of target violence).

107. ABBOTT, *supra* note 1, at 79.

Three principles—proportionality, necessity, and fault—have traditionally resolved self-defense issues in criminal cases.[108] Their application to the prison's disciplinary system should be informed by the normative arrangements of the contemporary prison and, more importantly, should promote target safety in a manner that minimizes adverse consequences for prison discipline.

*1. Proportionality.*—The law of self-defense in criminal cases requires that defensive force be proportionate to the interest in jeopardy.[109] The same standard ought to apply when disciplinary charges are at issue because any force beyond that reasonably required by the circumstances fails to advance the target's liberty interest in personal safety. A proportionality requirement is common among the states that delineate the elements of a successful plea of inmate self-defense.[110] Ohio, for instance, stipulates that reasonable force is "limited to that force necessary to defend against or repel a physical attack to avoid injury . . . ."[111]

The first of two pertinent issues is whether reasonable force can include the target's use of a contraband weapon. Although Wisconsin's prison regulations stipulate that a weapon is never justified,[112] the other departments of corrections are silent on this matter. Given the likelihood that a determined aggressor would be armed with a "shank" or some other crude weapon,[113] the proportionality requirement should not bar the target's use of a weapon per se. In much the same way, the criminal law does not disqualify armed persons from excusing their actions on the grounds of self-defense.[114] In determining which circumstances justify the use of a weapon, hearing officers should consider whether the aggressor was armed, the comparative size of the combatants, and the availability of staff members to rescue the target.[115]

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108. Richard A. Rosen, *On Self-Defense, Imminence, and the Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 378 (1993).

109. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 392-94 (1977); ROLLIN M. PERKINS, CRIMINAL LAW 996 (2d ed. 1969).

110. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994); OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993); UTAH CODE ANN. § 76-2-402 (1995); WIS. ADMIN. CODE § DOC 303.05(4) (June 1994).

111. OHIO DEP'T OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 25-26 (June 1993).

112. WIS. ADMIN. CODE § DOC 303.05(4) (June 1994).

113. Inmates possess a wide array of weapons made from bedframes, razor blades, spoons, wire, and rope. Robertson, *supra* note 15, at 106. Weapons crafted from the inmate's physical environment are "endemic." PRISON VICTIMIZATION, *supra* note 2, at 30.

114. PERKINS, *supra* note 109, at 1007.

115. Similar considerations are found in the self-defense provisions published by the Wisconsin Department of Corrections. WIS. ADMIN. CODE § DOC 303.05(4) (June 1994):

(a) Whether a weapon was used by the aggressor;

(b) The size of the inmates;

(c) The opportunity of an inmate who claims self-defense to flee or get assistance from a staff member; and

(d) Whether staff members were nearby.

The second issue concerns whether injury to an inmate's honor justifies the use of force. At common law, only the threat of physical harm or unlawful arrest could be met with defensive force.[116] Among state correctional agencies, four expressly limit self-defense to situations endangering bodily safety.[117] Although prison norms legitimate violence when one's honor is verbally assailed,[118] shielding such conduct from disciplinary measures would extend the right of self-defense beyond the liberty interest from which it emanates.

2. *Necessity.*—Self-defense excuses otherwise criminal conduct only when protective force is truly necessary.[119] This is often read to mean that the target cannot defend himself until a reasonable person in his situation would apprehend an imminent threat of harm.[120] Some jurisdictions also require retreat, if possible, before resorting to defensive violence.[121] But in the unique, closed prison environment, where vulnerable inmates cannot run from predators, necessity can sometimes justify preemptive force.

It is for good reason that many targeted inmates initiate combat in anticipation of a forthcoming but not yet imminent attack.[122] Because targets are frequently of smaller stature than their aggressors,[123] a preemptive strike can be a necessary and thus legitimate means of leveling the playing field. One commentator's insights are apropos:

> The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If the threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively.[124]

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116. PERKINS, *supra* note 109, at 995-97.

117. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994) ("The resident must have had physical force used against him . . . ."); OHIO DEPT. OF REHABILITATION AND CORRECTION, INMATE DISCIPLINARY MANUAL 26 (June 1993) ("defend against or repel a physical attack"); UTAH CODE ANN. § 76-2-402 (1994) ("defend . . . against such other's imminent use of unlawful force"); WIS. ADMIN. CODE § DOC 303.05(4) (June 1994) ("prevent death or bodily injury").

118. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994).

119. Rosen, *supra* note 108, at 42.

120. *Id.* "Taken literally, the *imminent* requirement would prevent D from using deadly force in self-defense until A is Standing over him with a knife . . . ." 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1), at 78 (1984) (footnote omitted).

121. 2 ROBINSON, *supra* note 120, § 131(d)(3), at 84-87.

122. LOCKWOOD, *supra* note 7, at 42.

123. Professor Lockwood found targets to be physically different from aggressors in the following ways: first, targets are much more likely to be white; second, they weigh fifteen pounds less than aggressors; and third, to aggressors, targets, especially slender white males, are perceived as attractive. *Id.* at 31-33.

124. 2 ROBINSON, *supra* note 120, § 131(c)(1), at 78. The departments of only two states condition excusable force on the imminence of aggression. MICHIGAN DEP'T OF CORRECTIONS

Normative considerations can also validate preemptive measures. In the inmate subculture a "real man" stands his ground when threatened with injury, "answer[ing] threat with threat,"[125] which may require him to land the first blow. Less drastic action might diminish the target's stature, placing him in even greater danger.

*3. Fault.*—Aggressors and persons engaged in mutual combat cannot employ self-defense as an excuse to criminal charges.[126] They must withdraw from the confrontation before their status can be altered to that of targets.[127] Similarly, predatory inmates who meet their match should not be allowed to claim self-defense when accused of prison misconduct.[128] It is important to emphasize that preemptive attacks by vulnerable inmates do not render them at fault.[129] For their part, putative targets will bear the burden of establishing that, regardless of who initiated the combat, they had a reasonable apprehension their adversaries would soon harm them. Once staff intervene, targeted inmates must withdraw or be subject to disciplinary sanctions.[130]

## CONCLUSION

Humane imprisonment requires freedom from the constant threat of victimization, be it at the hands of staff or inmates. By this standard, American prisons fail more often than they succeed. In those prisons that resemble a state of nature, where the strong are allowed to prevail over the weak, self-defense becomes a moral imperative that is worthy of constitutional protection.

A right to self-defense will likely impact prison life favorably. Three considerations suggest that the overall level of inmate-on-inmate violence will not rise as a consequence. First, numerous states presently excuse some instances of

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HEARINGS HANDBOOK 33 (1994) ("The resident must have had physical force used against him/her, or reasonably believed that the use of physical force against him/her was imminent."); UTAH CODE ANN. § 76-2-402 (1995) ("defend . . . against such other's imminent use of unlawful force").

125. LOCKWOOD, *supra* note 7, at 47 ("Those identifying with the convict code feel they must answer threat with threat."). The same considerations of honor and dignity underly the "true man" rule in criminal cases, which permits the use of defensive force without the necessity of retreating. Philip E. Mischke, *Criminal Law—Homicide—Self-Defense—Duty to Retreat*, 48 TENN. L. REV. 1000, 1001-02 (1981).

126. PERKINS, *supra* note 109, at 1006.

127. *Id.*

128. The inmate self-defense rules in Michigan and Utah do not excuse the original aggressor or inmates who provoke attacks or engage in mutual combat. MICHIGAN DEP'T OF CORRECTIONS HEARINGS HANDBOOK 33 (1994); UTAH CODE ANN. § 76-2-402 (1995).

129. *See supra* notes 35-39 and accompanying text (discussing target-initiated violence, which is both normative and utilitarian amongst inmates seeking to protect themselves from predators).

130. *See generally* WIS. ADMIN. CODE § DOC 303.05(4) (June 1994) ("An inmate may not continue to exercise the privilege of self-defense after an order to stop.").

target violence.[131] Second, even in those states that do not excuse target violence, it already receives wide normative support from inmates and staff alike.[132] Third, disciplinary hearing officers will not side with inmates claiming self-defense unless they offer compelling documentation of their vulnerability.[133] On the other side of the ledger, constitutional recognition of inmate self-defense will deter some potential aggressors. Indeed, by conferring de jure legitimacy on target violence, vulnerable inmates will be encouraged to fight for their honor, dignity, and physical well being, which perhaps more than any other measure will safeguard them until such time as correctional authorities win back prisons from their predatory residents.

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131. Twelve states formally recognize inmate self-defense, twenty-one states permit it as a matter of custom, and six states consider self-defense only in the mitigation of disciplinary offenses. *See supra* notes 64-76 and accompanying text.

132. *See supra* notes 35-37 and accompanying text (discussing inmate and staff attitudes toward self-defense).

133. Disciplinary tribunals, especially those composed of correctional officers who otherwise work alongside the accusing officer, are very much inclined to side with the accusing officer. As Justice Blackmun observed in Cleavinger v. Saxner, 474 U.S. 193 (1985):

> [T]he members of the [disciplinary] committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality . . . . They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties . . . . They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee . . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

*Id.* at 203-04 (footnotes omitted). *See, e.g.*, Wick, *supra* note 80, at 313 ("[insiders] naturally tend to accept the word of the guard, a fellow-official"); Karla M. Gray, *The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners*, 26 HASTINGS L.J. 1277, 1295 (1975) ("officials naturally tend to accept the word of the accusing guard") (footnote omitted).

# ANALYSIS OF INDIANA TORT REFORM 1995: THE EFFECTS OF HOUSE ENROLLED ACT 1741

FREDERICK R. HOVDE*

Proponents of House Bill 1741 called it the Personal Responsibility Act of 1995. The Bill has been described as "very balanced and modest in its reform."[1] It passed the House by a vote of 52 to 47 and was amended and passed the Senate by a vote of 30 to 20.[2] The House concurrence vote was 51 to 46.[3] The Bill was then vetoed by the Governor on April 21, 1995.[4] The Veto was overridden by the

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1. Memorandum from Senator Luke Kenley to all Republican Senators (April 19, 1995) (on file with author).

2. STATE OF INDIANA, 109TH GENERAL ASSEMBLY, INDEX TO HOUSE AND SENATE JOURNALS 239 (1995) [hereinafter INDEX].

3. *Id.*

4. Governor Bayh addressed the House as follows:

Mr. Speaker and Members of the House:

As Thomas Jefferson, the author of our Declaration of Independence, once wrote: "The right to trial by jury in a democracy is even more important than the right to vote."

Since the founding of our republic and before, the American people have looked for impartial justice to a judge and jury of our peers—men and women without lobbyists, political action committees or friends in high places—to find the facts and apply the law.

In general, we are well served when judges and juries, not politicians, dispense justice. Judges and juries reward the deserving and punish the guilty based upon the specific facts of each case not the broad generalities politicians must necessarily use. House Bill 1741 demonstrates the unfairness that can result when we replace the judgment of judges and juries with that of politicians who are unaware of the facts in individual cases.

For example:

A 38 year old man from Columbus, Indiana, spent only twenty-one minutes in a tanning booth and was burned so severely that his leg had to be amputated. The company that manufactured the tanning booth is from out of state and has since gone out of business. Under 1741, this young man could be denied any compensation whatsoever.

A hardworking Hoosier family from Muncie, Indiana, was struck by disaster when Christmas tree lights destroyed their home and took the lives of their two small sons, ages 3 and 5. The lights were made in Indonesia. Under 1741, it would be extremely difficult, perhaps impossible, for this family to recover.

House with a vote of 51 to 49 and by the Senate with a vote of 30 to 18.[5] This law has been assailed by its opponents as lacking a basis of objective facts and perpetuating a myth founded on political rhetoric and emotion.[6]

## I. THE AMENDMENTS TO THE PRODUCTS LIABILITY AND COMPARATIVE FAULT STATUTES

### *A. Products Liability*

The Indiana Products Liability Act[7] now applies to and governs all actions brought by a user or consumer against a manufacturer or seller for physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought.[8] Formerly, the Products Liability Act applied only to actions in which the theory of liability was strict liability in tort.

The definitions of the Act were amended to redefine a seller and to distinguish a manufacturer.[9] A "seller" is a "person engaged in the business of selling or leasing a product for resale, use, or consumption."[10] A "manufacturer" is a "person or an entity that designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of

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> In Losantville, Indiana, a 32 years old woman was severely burned at work—permanently disfiguring her face—when a bottle of dangerous chemicals fell from a shelf. Under 1741, this young woman would probably be unable to recover fully for her damages.
>
> Is that what the people of Indiana or even the authors of H.B. 1741 intend? It is, unfortunately, what this law would do.
>
> Some parts of this bill are good, for example, providing a defense for manufacturers who have received strict regulatory approval for their products and placing reasonable limits on punitive damages. But these and other worthy goals can be achieved without replacing the judgment of judges and juries with that of politicians. Judges and juries know the facts of individual cases; politicians do not. To restrain frivolous lawsuits we should punish unscrupulous lawyers, not innocent victims.
>
> Accordingly, I am Vetoing this bill and returning it to the Legislature for further deliberations.

Governor Evan Bayh, Message of the Governor Before the Indiana House of Representatives (April 21, 1995) (on file with author).

5. INDEX, *supra* note 2, at 239.

6. *See, e.g.*, NATIONAL CENTER FOR STATE COURTS', COURT STATISTICS PROJECT, THE STATE COURT STATISTICS: ANNUAL REPORT 1992 (1993).

7. IND. CODE §§ 33-1-1.5-1 to -10 (Supp. 1995).

8. *Id.* § 33-3-1.5-1.

9. *Id.* § 33-1-1.5-2.

10. *Id.* § 33-1-1.5-2(5).

the product to a user or consumer."[11] A manufacturer includes a seller who:

> (A) has actual knowledge of a defect in a product;
>
> (B) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
>
> (C) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;
>
> (D) is owned in whole or a significant part by the manufacturer; or
>
> (E) owns in whole or significant part the manufacturer.[12]

A seller who places a private label on a product is not a manufacturer so long as the seller discloses the name of the actual manufacturer of the product.[13]

The above definitions were changed to coincide with an amendment to the former section on strict liability in tort[14] which now provides immunity to a seller for strict liability claims (but not negligence claims) unless the seller is a manufacturer of the product or the part of the product that is alleged to be defective. In addition to the circumstances where a seller is considered a manufacturer, as the term is defined in the statute, a seller is also considered a manufacturer if a court is unable to obtain jurisdiction over a manufacturer of a product.[15]

Strict liability in tort is now limited to defective conditions unreasonably dangerous to any user or consumer other than design, inadequate warning, or instruction theories.[16] Strict liability is therefore limited to manufacturing defects. Any action based on a design defect or failure to provide adequate warning or instructions is now decided on a negligence standard. The standard is reasonable

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11. *Id.* § 33-1-1.5-2(3).
12. *Id.*
13. *Id.*
14. *Id.* § 33-1-1.5-3.
15. *Id.* § 33-1-1.5-3(d). This subsection does not limit other actions against a seller of a product.
16.

> [I]n any action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

*Id.* § 33-1-1.5-3(b).

care under the circumstances in designing the product and in providing sufficient warnings and instructions.[17]

The enumerated defenses to a products liability action are now available under either strict liability or negligence. The defenses are as follows: incurred risk,[18] misuse,[19] and modification or alteration of the product.[20] Conforming with state of the art safety applications for the product or compliance with federal or state codes, standards, regulations, or specifications creates a rebuttable presumption that the product was not defective and the manufacturer or seller was not negligent.[21] The definition of incurred risk was changed by deleting the word "unreasonable" as it relates to the use of a product that was known to be defective. The defenses of misuse and modification or alteration of the product remain the same.[22]

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17. *Id.* The House version of section 33-1-1.5-4 contained subsection (c), which explained: "The defenses contained in this section are complete defenses and preclude liability if proven and may not be considered as mere evidence of fault or the absence of fault under section 10 of this chapter." This subsection was deleted in the Senate committee. STATE OF INDIANA, 109TH GENERAL ASSEMBLY, JOURNAL OF THE HOUSE OF REPRESENTATIVES 375 (1995) [hereinafter JOURNAL OF THE HOUSE].

18. IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1995). The House version of this section stated:

> It is a defense that the user or consumer bringing the action knew of the defect and was aware of the danger in the product [or of a risk related to the manner in which the product was being used] and nevertheless proceeded to make use of the product [or continued in the course of conduct involving the use of the product] and was injured.

JOURNAL OF THE HOUSE, *supra* note 17, at 374. The bracketed language was deleted in the Senate committee. *See* STATE OF INDIANA, 109TH GENERAL ASSEMBLY, JOURNAL OF SENATE 610 (1995).

19. IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1995). This subsection allows a person other than the claimant to be added as a party defendant.

20. *Id.* § 33-1-1.5-4(b)(3).

21. *Id.* § 33-1-1.5-4.5. The state of the art presumption was amended in the Senate committee by Senator Kenley to add the qualifier "the safety of" to subsection (1). The section thus provides:

> In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:
>
> (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
>
> (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

*Id.*

22. *Id.* § 33-1-1.5-4(b)(2) (misuse); *id.* § 33-1-1.5-4(b)(3) (modification).

### *B. Comparative Fault and Products Liability*

New sections were added to the Products Liability Act that provide for comparative fault and the elimination of joint or shared liability. Fault as defined in the Products Liability Act is the same as fault under the Comparative Fault Act.[23] A person or entity that is liable to a plaintiff under a theory of strict liability is also considered to be at fault under the Products Liability Act.[24]

Instructions to the jury in a products liability case relating to assessment of the percentage(s) of fault[25] are similar to the Comparative Fault Act.[26] The fault of all persons is to be considered by the jury in assessing percentages of fault, "regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm."[27]

### *C. Comparative Fault*

The definition of fault was amended to include intentional acts.[28] In all other respects it remains the same.[29] If the plaintiff is a victim of an intentional tort, he may recover all of his damages in a civil action against the defendant who was criminally convicted based upon the same evidence.[30]

The definition of a nonparty was amended and now refers to "a person who caused or contributed to cause the injury, death, or damage to property but who has not been joined in the action as a defendant."[31] Removed from the definition of nonparty was the language, "is or may be liable to the claimant in part or in whole for the damages claimed" and "a nonparty shall not include the employer of the claimant."[32]

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23. *Id.* §§ 33-1-1.5-10(a), 34-4-33-2(a)(1). The definition of fault in the Comparative Fault Act was amended to include intentional acts. *See infra* note 28.

24. IND. CODE § 33-1-1.5-10(a)(2) (Supp. 1995).

25. *Id.* § 33-1-1.5-10(b).

26. *Id.* § 34-4-33-5.

27. *Id.* § 33-1-1.5-10(c). A nonparty defense must still be pled pursuant to Indiana Code Section 34-4-33-10, and a nonparty must be specifically identified by name pursuant to Indiana Code Section 34-4-33-6. *See also* Cornell Harbison Excavating Inc. v. May, 546 N.E.2d 1186 (Ind. 1989).

28. "'Fault' includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury as to mitigate damages." IND. CODE § 34-4-33-2(1) (Supp. 1995).

29. *Id.* § 34-4-33-2(a)(1). Until the second set of second reading amendments in the House, the Bill contained section fifteen which provided that assumption of risk was a complete defense to a personal injury action. JOURNAL OF THE HOUSE, *supra* note 17, at 639.

30. IND. CODE § 34-4-33-5(d) (Supp. 1995).

31. *Id.* § 34-4-33-2(2).

32. *Id.* § 34-4-33-2(a)(2). *See supra* note 27. The old version read: "'Nonparty' means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who

The section on jury instructions and the award of damages was amended to provide that a jury may not be informed of any immunity defense that is available to a nonparty.[33] In addition, when assessing the percentage(s) of fault, the jury is required to consider the fault of all persons regardless of whether a person was or could have been named as a nonparty.[34]

## II. ANALYSIS

As House Enrolled Act 1741 is applied to real life situations, its ultimate effect and significance will become known. While legislative enactment codifies the law, its ultimate interpretation lies with the courts.[35]

### *A. Comparative Fault Does Not Apply to Manufacturing Defect Actions (Strict Liability)*

Strict liability actions were preserved in manufacturing defect cases.[36] Comparative fault principles were extended to design defect and failure to warn or instruct theories of liability. They cannot be applied to strict liability actions because comparative fault principles are irrevocably inconsistent with strict liability. Strict liability is found in the *Restatement (Second) of Torts* Section 402A and was adopted by Indiana courts in 1970.[37] Under strict liability theory, a person who sells a product in a defective condition unreasonably dangerous to any user or consumer is liable for any physical harm caused by that product, even though the seller exercised all reasonable care in the manufacture and preparation of the product.[38] In other words, liability attaches to a seller for an unreasonably dangerous product that causes harm regardless of fault.

Strict liability does not involve the traditional concepts of negligence and

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has not been joined in the action as a defendant by the claimant." IND. CODE § 34-4-33-2 (1993) (amended 1995).

33. IND. CODE §§ 34-4-33-5(a)(1), -5(b)(1) (Supp. 1995). *See supra* note 27.

34. IND. CODE § 34-4-33-5(a)(1) (Supp. 1995). *See supra* note 27.

35.

> The ultimate responsibility for recognizing and revising the common law of Indiana rests with this Court. We cannot close our eyes to the legal and social needs of our society, and this court should not hesitate to alter, amend or abrogate the common law when society's needs so dictate. The common law must keep pace with changes in our society, and it is not a frozen mold of ancient ideas, but such law is active and dynamic and thus changes with the times and growth of society to meet its needs. Based upon human experience, the common law represents the unceasing effort of an enlightened people to ascertain what is right and just.

Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1289 (Ind. 1994) (Dickson, J., concurring) (citations omitted).

36. IND. CODE § 33-1-1.5-3 (Supp. 1995).

37. Cornette v. Searjeant Metal Prods., Inc., 258 N.E.2d 652, 656 (Ind. Ct. App. 1970).

38. IND. CODE § 33-1-1.5-3(b)(1) (Supp. 1995).

fault.[39] Comparative fault principles, therefore, should not be applied to strict liability actions. The Comparative Fault statute requires jurors to compare the fault of all persons who contributed to the harm suffered by the plaintiff. It is difficult to see how a statute requiring a jury to allocate fault can be applied to strict liability where fault is excluded. It also defies logic to expect a jury to compare a seller's strict liability for a manufacturing defect to a negligence claim based upon the same defect.[40] Rules of statutory construction[41] require courts to strictly construe and narrowly apply new statutes. Therefore, the courts cannot assume that the legislature intended to change the common law beyond what it declares either in express terms or by unmistakable implication.

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39. *Cornette*, 258 N.E.2d at 656.
40. IND. CODE §§ 33-1-1.5-10(b), 34-4-33-5 (Supp. 1995).
41. The rules of statutory construction are as follows:

    1. The Indiana Judiciary has the constitutional authority and duty to interpret and administer the law. IND. CONST. arts. III, VII.

    2. The Indiana General Assembly intends to act in a humanitarian manner. Holmes v. Review Bd. of Ind. Emp. Sec. Div., 451 N.E.2d 83, 86 (Ind. Ct. App. 1983).

    3. Laws in derogation of common law must be strictly construed and narrowly applied. Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468, 473 (Ind. 1988).

    4. "The legislature does not intend by statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication." Indianapolis Power & Light Co. v. Brad Snodgrass, Inc., 578 N.E.2d 669, 673 (Ind. 1991).

    5. "If the language of a statute is clear and unambiguous it is not subject to judicial interpretation." Avco Fin. Serv. v. Metro Holding Co., 563 N.E.2d 1323, 1328 (Ind. Ct. App. 1990).

    6. If the language is reasonably susceptible to more than one construction, the Judiciary must construe the statute to determine the apparent legislative intent. *Id.*

    7. Statutory provisions cannot be read standing alone but must be construed in light of the entire act of which they are a part. Deaton v. City of Greenwood, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991).

    8. When construing a statute to determine the legislative intent, words and phrases are given their common and ordinary meaning. Crowley v. Crowley, 588 N.E.2d 576, 578 (Ind. Ct. App. 1992).

    9. When the legislature enacts a statute, it is presumed that it is aware of existing statutes in the same area. Inman v. Farm Bureau Ins., 584 N.E.2d 567, 569 n.3 (Ind. Ct. App. 1992).

    10. Enactments by the Indiana General Assembly relating to product liability are in derogation of the common law and must be strictly construed. McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp., 647 N.E.2d 355, 359 (Ind. Ct. App. 1995).

*B. Neither Employers Nor Immune Persons May Be Considered at Fault*

"Fault" under both the Products Liability Act and the Comparative Fault Act is defined as an act or omission that is negligent, willful, wanton, or intentional toward the person or property of others.[42] In order for an act or omission to be negligent, there must be: a duty owed by a person to conform his conduct to a standard of care necessitated by his relationship with the plaintiff; a breach of that duty; and an injury proximately caused by the breach.[43] In a products liability action, the "fault" of the person suffering the physical harm, as well as the "fault," of all others who caused or contributed to the harm, shall be compared by the trier of fact in accordance with the Comparative Fault Act.[44] The fact finder shall determine the percentage of "fault" of the claimant, the defendant, and any person who is a nonparty.[45]

Neither an employer nor an immune nonparty can be assessed a percentage of "fault" because neither owes a duty to the claimant. An employer's duty to an employee is to refrain from intentional injury. Therefore, unless an employer intentionally injures an employee, the employer cannot be assessed "fault" under either the Products Liability Act or the Comparative Fault Act.[46]

The employer's duty to the employee was defined by the Indiana Supreme Court in *Baker v. Westinghouse Elec. Corp.*[47] In addressing an employer's alleged intentional tort and its relationship to the exclusivity provisions of the Workmen's Compensation Act, the Court stated:

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42. IND. CODE § 33-1-1.5-10 (Supp. 1995) (Product Liability Act); *id.* § 34-4-33-2(1) (Comparative Fault Act).

43. Greathouse v. Armstrong, 616 N.E.2d 364, 368 (Ind. 1993).

44. IND. CODE §§ 34-4-33-1 to -12 (Supp. 1995).

45. *Id.* § 34-4-33-5(a)(1). Although a nonparty is defined as a person who caused or contributed to the alleged injury and was not joined in the cause of action as a defendant, in order for the jury to allocate "fault" of a nonparty, the nonparty must be at fault. A jury is allowed to compare only "fault," not conduct.

Testimony at the Senate Hearing on Tort Reform confirms this analysis. Senator Hellmann noted the change in the definition of a nonparty and addressed this to Senator Kenley, the Senate's spokesman for the bill. He asked whether it was still necessary under House Bill 1741 for there to be a legal duty, a breach of that duty, and proximate cause before a nonparty could be at fault. Senator Kenley replied:

> "I think that's a possible interpretation. I think you could take that same section and interpret it to use the same principles of tort law that you are using today and say that those elements must be present under tort law, and I think that would probably be the advisable thing to do."

Transcription of Senate Debate on Tort Reform at 22 (on file with author).

46. The language that "[a] nonparty shall not include the employer of the claimant," IND. CODE § 34-4-33-2(a)(2) (Supp. 1995), had to be deleted from the nonparty definition because an employer's intentional conduct can lead to "fault," while his negligent conduct cannot. *Id.* § 34-4-33-2(a)(1).

47. 637 N.E.2d 1271 (Ind. 1994).

> The exclusivity provision is expressly limited to personal injury or death arising out of and in the course of employment which occurs "by accident." Because we believe an injury occurs "by accident" only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act.
>
> This approach is consistent with the legislative objectives which shape our workers compensation scheme. Historically, workers compensation was concerned not with intentional torts but with the intolerable results that flowed from the common law's treatment of workers' negligence actions. During the nineteenth century, common law judges clung to personal fault as the sine qua non of employer liability despite the increasingly massive and impersonal nature of the workplace. If the employer was not "at fault," it was inconceivable to judges in the last century that it should be compelled to contribute towards the support of the worker or his family.
>
> The battery of defenses which the courts used prior to the compensation act to enforce the fault requirement was especially devastating to workers. The defenses of assumption of risk, fellow servant and contributory negligence, dubbed the unholy trinity by Dean Prosser, prevented recovery by some eighty percent of those workers who litigated their injury claims.[48]

The Workmen's Compensation Act created no fault liability and obviated the uncertainty, delay, and expense of common law remedies by substituting a fixed compensation schedule.[49] The costs of the no fault liability scheme were borne by the industry.[50] Liability that was "predictable" was thus factored accurately into the cost of production and passed on to the consumer.[51] In return the legislature removed any common law duty owed by an employer to exercise reasonable care for the safety of its employees. Evidence of employer conduct, however, was still admissible, not for purposes of allocating "fault," but to contest whether a plaintiff had met his burden of proving "fault" under the Act.[52]

A parallel argument exists with respect to immunity. At the time of the enactment of the Indiana Tort Claims Act,[53] the common law did not provide immunity to governmental entities from tort claims resulting from an employee's breach of a private duty owed to an individual, but did provide for immunity from claims resulting from a breach of its public duties owed to all.[54] The Tort Claims

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48. *Id.* at 1273-74 (citations omitted).
49. *Id.* at 1274.
50. *Id.*
51. *Id.*
52. Wethington v. Wellington Indust., Inc., 781 F. Supp. 1379, 1384 (S.D. Ind. 1991).
53. IND. CODE §§ 34-4-16.5-1 to -22 (1993 & Supp. 1995).
54. Tittle v. Mahan, 582 N.E.2d 796, 799 (Ind. 1991).

Act established limitations on judicially decreed rights to sue and recover from governmental entities and their employees. The Act did not create a right to sue a governmental entity or its employees, but instead regulated the common law right to bring such actions by enacting notice requirements, limitations on recovery, and immunity provisions.[55] The immunity analysis does not turn on what duty, if any, has been violated, but instead focuses on whether certain protected conduct has been engaged in.[56]

Governmental immunity serves a variety of purposes. For example, immunity for discretionary functions avoids inhibiting the effective and efficient performance of governmental duties. Immunity for basic planning and policy-making functions has been deemed necessary to avoid a chilling effect on the ability of the government to deal effectively with difficult policy issues.

> The judiciary confines itself . . . to adjudication of facts based on discernible objective standards of law. In the context of tort actions . . . , these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not unreasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.[57]

If the premise for immunity is that judicial analysis of certain governmental conduct is inadequate, then an immune person should never be considered at "fault" for purposes of comparative negligence. This is true because "fault" requires a duty, a breach, and a proximate cause. Yet, there are simply no definable standards by which these elements can be measured with respect to the actions or inactions of a governmental entity.

Those who are excluded from the nonparty definition under House Enrolled Act 1741 and the Comparative Fault Act include: persons who cannot be at "fault" (immune parties), persons whose conduct does not rise to the level of "fault" (employers, immune parties, drivers to which the guest statute applies), persons who are incapable of identification,[58] and manufacturers over whom the court cannot obtain jurisdiction.[59] A majority of the immunities granted by the legislature are partial immunities that protect a class of persons from liability for certain conduct. Nevertheless, their conduct may rise to a level (intentional, reckless, wanton, willful, etc.) which places them at "fault" and removes the

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55. IND. CODE §§ 34-4-16.5-1 to -22 (1993 & Supp. 1995).

56. *Tittle*, 582 N.E.2d at 799-800. *But see* Belding v. Town of New Whiteland, 622 N.E.2d 1291 (Ind. 1993) (holding police officers are immune from liability for breach of public duties owed to public at large but not private duties owed to individuals); Quakenbush v. Lackey, 622 N.E.2d 1284 (Ind. 1993).

57. Peavler v. Board of Comm'rs, 528 N.E.2d 40, 44-45 (Ind. 1988), *aff'd*, 557 N.E.2d 1077 (Ind. Ct. App. 1990) (quoting Blessing v. United States, 447 F. Supp. 1160, 1170-72 (E.D. Pa. 1978)).

58. IND. CODE § 34-4-33-6 (1993).

59. *Id.* § 33-1-1.5-3(d) (Supp. 1995).

immunity protection.

### *C. Presumptions Are Not Evidence But Rules of Law and Are Not Proper Subjects for Jury Instruction*

The state of the art defense in strict liability[60] was abolished and replaced with a rebuttable presumption of no negligence if the product conformed with state of the art safety applications or was in compliance with applicable government codes, standards, regulations, or specifications.[61] In practice, the creation of the rebuttable presumption for product compliance with codes, standards, regulations, or specifications requires a plaintiff to produce evidence sufficient to establish a prima facie case. This evidence may include: failure to comply; knowledge by the defendant that the product failed or caused injury even though the product was in compliance; and failure to comply with state of the art safety applications.

A rebuttable presumption places upon a party the burden of going forward with the evidence. For example, at trial, the plaintiff is required to introduce some evidence to rebut or meet a presumption in order to avoid a judgment on the evidence. Before trial, the plaintiff is required to provide some evidence to avoid summary judgment. Presumptions simply determine the order of proof or whether a prima facie case has been made.[62]

The treatment and effect of the rebuttable presumption is seen in *Peavler v. Board of Commissioners of Monroe County*.[63] In *Peavler*, the relevant issue was the plaintiffs' tendered instruction regarding the presumption that a legally sufficient warning would have been heeded. The court held that presumptions are not evidence but rules of law which guide the order of proof and establish the bounds of a prima facie case. "Once the duty of going forward with evidence has been discharged, the presumption is functus officio and has no proper place in jury instructions."[64]

### *D. Compliance with Federal Safety Regulations Such as OSHA, IOSHA and Self Regulating Standards Does Not Create a Rebuttable Presumption That a Product is Not Defective*

The Indiana Occupational Safety and Health Act (IOSHA)[65] adopted all federal occupational safety and health standards. The Indiana Commissioner of Labor's adoption of the federal regulations in Indiana is specifically limited to the promulgation of regulations that cover employers or employees.[66] The

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60. *Id.* § 33-1-1.5-4(b)(4) (1993) (amended 1995).

61. *Id.* § 33-1-1.5-4.5 (Supp. 1995).

62. IND. R. EVID. 301; *see also* State Farm Mut. Auto Ins. v. Shuman, 370 N.E.2d 941, 955 (Ind. Ct. App. 1977).

63. 557 N.E.2d 1077 (Ind. Ct. App. 1990).

64. *Id.* at 1083.

65. IND. CODE §§ 22-8-1.1-1 to -50 (1993 & Supp. 1995).

66. *Id.* § 22-1-1-11 (1993).

Occupational Safety and Health Act[67] is lengthy and covers a myriad of safety standards for products used in the workplace. It does not, however, discuss the duties of manufacturers who may have sold the products. Both OSHA and IOSHA specifically preclude a private right of action based upon the regulations.[68] While safety codes and standards can show that certain safeguards are practical, feasible, and generally used in the custom and practice of a particular manufacturing industry, compliance with them does not create a rebuttable presumption that the manufactured product was not defective.[69]

### *E. Incurred Risk*

The defense of incurred risk is still the same whether the theory is strict liability or negligence. The appropriate jury instruction is still Indiana Pattern Jury Instruction 5.61.[70] The word "unreasonably" was deleted from the incurred risk defense definition; however, because it applies to an action brought under a products liability claim it must be given the proper construction by reading the provision in light of the entire Act.[71] The Product Liability Act defines "fault" to include "unreasonable failure to avoid an injury . . . ."[72] The Comparative Fault Act defines "fault" to include "incurred risk, and unreasonable failure to avoid an injury . . . ."[73] To avoid confusion when both strict liability and negligence issues are present, the incurred risk instruction must be consistent and the same standards must apply to both. This is accomplished by the pattern jury instruction noted

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67. 29 U.S.C. §§ 651-678 (1994).

68. IND. CODE § 22-8-1.1-48.1 (1993); Slaubaugh v. Willies Dev., Inc., 654 N.E.2d 746, 749 (Ind. Ct. App. 1995); Maynard v. Flanagin Bros. Inc., 484 N.E.2d 71, 73 (Ind. Ct. App. 1985).

69. Note, *The Use of OSHA in Products Liability Suits Against The Manufacturers of Industrial Machinery*, 11 VAL. U. L. REV. 37 (1976). The same analysis applies to the American National Standards Institute standards "adopted" by many self-regulating groups. *See, e.g.*, Martin v. Simplimatic Eng. Corp., 390 N.E.2d 235, 238 (Ind. Ct. App. 1979).

70. Indiana Pattern Jury Instruction 5.61 reads as follows:

> When a person knows of a danger, understands the risk involved and voluntarily exposes himself to such danger, that person is said to have "incurred the risk" of injury.
>
> In determining whether the [plaintiff] incurred the risk, you may consider the experience and understanding of the [plaintiff]; whether the [plaintiff] had reasonable opportunity to abandon his course of action; and whether a person of ordinary prudence, under the circumstances, would have refused to continue and abandoned the course of action.

INDIANA JUDGES ASS'N, INDIANA JURY INSTRUCTIONS 99 (2d ed. 1989).

Indiana Pattern Jury Instruction 5.65 is also relevant. This instruction refers to an "employee" not assuming "extraordinary risks of which he is ignorant and that are not obvious and that cannot be readily seen and appreciated by an ordinarily careful and prudent person. [Nor does an employee assume risks created by the employer's violation of law.]" *Id.* at 101.

71. *See supra* note 41.

72. IND. CODE § 33-1-1.5-10(a)(1) (Supp. 1995).

73. *Id.* § 34-4-33-2(a)(1).

above.

## CONCLUSION

House Enrolled Act 1741 will be subject to a considerable amount of interpretation because it has conflicting provisions, it is in derogation of common law, and it raises constitutional and procedural issues. The Act was created by a strategically selected house committee, debated little in the legislature, and hastily passed when the vote counts were considered favorable. Nevertheless, it is now the law and needs to be interpreted and applied correctly. This analysis is the result of a careful reading of all provisions and an attempt to apply them consistently with one another pursuant to the long established rules of statutory construction.

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# NOTES

## THE WORSENING PROBLEM OF TRIAL PUBLICITY: IS "NEW" MODEL RULE 3.6 SOLUTION OR SURRENDER?

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### INTRODUCTION

> Fair criminal prosecution and exercise of the guaranty of a free press are not incompatible with the constitutional right of a defendant to a fair trial by an impartial jury. Only the will to recognize and to subscribe responsibly to that fact has been lacking.[1]

Regrettably, in the thirty years since Judge Francis of the New Jersey Supreme Court wrote that passage, nothing has changed. The values of the fair administration of justice to both parties to a dispute and the right of free speech will always compete in some form. The goal must therefore be to discover and to exercise the will to make use of those rights responsibly.

Within the doctrinally irreconcilable debate between the poles of fair trial and free expression, however, there are certain areas in which those values must be harmonized, one of which concerns attorneys representing parties to litigation.[2] It has long been recognized that states, and specifically the judicial systems of the states, have authority to determine the standard of professional conduct for those admitted to the practice of law.[3] Most jurisdictions have enacted disciplinary rules matching or patterned after rules promulgated by the American Bar Association (ABA).[4] One ABA rule in particular, Model Rule of Professional Conduct 3.6,

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1. State v. Van Duyne, 204 A.2d 841, 852-53 (N.J. 1964).

2. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

3. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991).

4. At the time of the *Gentile* decision, thirty-two states had adopted trial publicity rules substantially similar to the "substantial likelihood of material prejudice" standard of the Model Rules of Professional Conduct, originally promulgated by the ABA in 1983. They are: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Gentile*, 501 U.S. at 1068 & n.1. Eleven states retained Disciplinary Rule 7-107 (DR 7-107) or its "reasonable likelihood of

governs the extrajudicial statements made by attorneys involved in ongoing litigation.[5] Though the rule is present in one form or another in practically every

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prejudice" standard from the Model Code of Professional Responsibility. They are: Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee, and Vermont. *Id.* & n.2. Five states—Illinois, Maine, North Dakota, Oregon, and Virginia—and the District of Columbia used standards approximating "clear and present danger." *Id.* at 1068-69 & n.3. Montana adopted Model Rule 3.6 following the decision in *In re* Keller, 693 P.2d 1211 (Mont. 1984), in which the Montana Supreme Court declared DR 7-107 unconstitutional on its face.

5. Rule 3.6, in its original form, stated:

Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

jurisdiction,[6] as with all issues pitting free speech against fair trial, it has engendered considerable constitutional debate.

The leading case concerning Rule 3.6 is *Gentile v. State Bar of Nevada*.[7] *Gentile* upheld the rule's limits on extrajudicial commentary, but struck down the interpretation of it given by the Nevada Supreme Court. Numerous commentators have argued that the Court was incorrect in its determination that the rule itself was sound.[8] Following the *Gentile* decision, the ABA amended Rule 3.6 in 1994 in an attempt to alleviate commentators' criticisms and adjust the rule for practical use.[9]

This Note will argue that the changes to Rule 3.6 do not resolve the problems and questions bound up in the issue of what attorneys should say about a proceeding outside the courtroom. Even though the rule addresses only one component of a highly-publicized trial, it is important to the fair administration of the judicial system to hold the extrajudicial commentary of lawyers to a high standard. Part I of this Note will highlight the development of Rule 3.6 and its 1994 amendments. Part II will analyze how state courts have defined terms within the rule and suggest how future cases may be decided. Finally, Part III will examine the weaknesses of the rule and recommend ways for courts to strengthen and utilize the rule.

## I. REVISED RULE 3.6 AND ITS BACKGROUND

The first wholesale efforts to create rules in the public interest limiting the out

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(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

6. *See supra* note 4.

7. 501 U.S. 1030 (1991).

8. *See, e.g.*, Esther Berkowitz-Caballero, Note, *In the Aftermath of* Gentile: *Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 524 (1993) (noting the Court espouses a rule "ultimately more restrictive of speech than necessary"); *see generally* Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The* Gentile State Bar of Nevada *Decision*, 43 CASE W. RES. L. REV. 1347 (1993); L. Cooper Campbell, Note, Gentile v. State Bar *and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 GEO. J. LEGAL ETHICS 583 (1993).

9. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.6:102, at 666.4 (2d ed. 1996).

of court speech of representing attorneys occurred following the assassination of President John F. Kennedy.[10] The Report of the President's Commission on the Assassination of President John F. Kennedy (Warren Report) "concluded that '[b]ecause of the nature of the crime, the widespread attention which it necessarily received, and the intense public feelings which it aroused, it would have been a most difficult task to select an unprejudiced jury [for Lee Harvey Oswald].'"[11] Though this statement refers to the prosecutor's advantage gained through publicity, the Commission also noted the potential for bias against the prosecution.[12] The Supreme Court pushed the effort along considerably with its decision in *Sheppard v. Maxwell.*[13] In a strongly worded opinion reflecting disgust over the handling of Dr. Samuel Sheppard's trial,[14] the Court declared: "[C]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."[15]

By 1969, the ABA had developed the Model Code of Professional Responsibility ("Code").[16] Found therein is Disciplinary Rule 7-107 (DR 7-107) with its prohibition of statements "reasonably likely to interfere with a fair trial."[17] Practically every state implemented DR 7-107 by 1980[18] despite federal appellate decisions such as *Chicago Council of Lawyers v. Bauer.*[19] In *Bauer*, the court stated the standard of DR 7-107 was "overbroad and therefore does not meet constitutional standards."[20] Further, the court specifically declared that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."[21] *Bauer* stands as the leading case holding the "reasonably likely" standard unconstitutional.

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10. *See* Berkowitz-Caballero, *supra* note 8, at 503-04. *See generally* Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940) (concerning publicity during the trial of Bruno Hauptmann in the Lindbergh kidnapping case).

11. Berkowitz-Caballero, *supra* note 8, at 503-04 (quoting Chief Justice Earl Warren, Chairman, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 227, 238 (1964)).

12. Berkowitz-Caballero, *supra* note 8, at 504 & n.57.

13. 384 U.S. 333 (1966).

14. Fourteen pages of Justice Clark's majority opinion are devoted solely to a minutely detailed description of the investigation, pretrial proceedings, and trial of Dr. Sheppard, as well as the prejudicial publicity surrounding them. *Id.* at 336-50.

15. *Id.* at 363.

16. Berkowitz-Caballero, *supra* note 8, at 509.

17. 1 HAZARD & HODES, *supra* note 9, § 3.6:102, at 665.

18. Berkowitz-Caballero, *supra* note 8, at 509 & n.88. *See generally* REGULATION OF LAWYERS: STATUTES AND STANDARDS 349 (Stephen Gillers & Roy D. Simon, Jr. eds., 1994).

19. 522 F.2d 242 (7th Cir. 1975).

20. *Id.* at 249.

21. *Id.* (quoting *In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971)).

Other courts took a dim view of the rule's breadth as well.[22] As a result, when the ABA promulgated the Model Rules of Professional Conduct in 1983 ("Rules"), it issued a new trial publicity rule,[23] Model Rule 3.6. Originally, this rule had three parts.[24] Paragraph (a) adopted a standard prohibiting statements that the attorney "knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[25] Paragraph (b) listed six categories of statements that were considered likely to violate paragraph (a).[26] Finally, paragraph (c) incorporated a safe-harbor provision permitting attorneys to make certain statements "without elaboration."[27]

Within four years, the Rules were adopted by twenty jurisdictions, and by 1990 the number had swelled to thirty-four states and the District of Columbia.[28] Eleven states, however, have retained either DR 7-107 or the standard within it.[29] It was with no small interest on the part of the nation's attorneys and disciplinary commissions that the Supreme Court considered a constitutional challenge to the "substantial likelihood of material prejudice" standard of Rule 3.6.[30]

One basis for the ABA's decision to change the rule[31] was the Court's decision in *Gentile v. State Bar of Nevada*.[32] In *Gentile*, the Court heard an appeal from a disciplinary sanction, pursuant to a rule[33] very similar to Rule 3.6,[34] upheld by the Nevada Supreme Court.[35] Attorney Gentile represented a Las Vegas man accused of theft.[36] Shortly after his client's indictment, and amid considerable

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22. *See* 1 HAZARD & HODES, *supra* note 9, § 3.6:102, at 665 ("Practically every court that considered constitutional challenges to DR 7-107 said that the rule was overbroad."); *see also* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (though the "reasonably likely" standard passes constitutional muster, other parts of the rule are overbroad).

23. Berkowitz-Caballero, *supra* note 8, at 512 & n.103.

24. *See supra* note 5.

25. *Id.*

26. *Id.*

27. *Id.*

28. 2 HAZARD & HODES, *supra* note 9, § AP4:101, at 1255.

29. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1068 & n.2 (1991). Those states are Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee, and Vermont. North Carolina adopted a "reasonable likelihood" of prejudice test within its rule. *See supra* note 4.

30. *Gentile*, 501 U.S. at 1030.

31. *See* 1 HAZARD & HODES, *supra* note 9. While amendments to the rule were envisioned prior to 1991 due to differences between sections of the ABA, the *Gentile* decision brought matters to a head. *Id.* § 3.6:100 (forthcoming 1995).

32. 501 U.S. 1030 (1991).

33. NEV. SUP. CT. R. 177 (1995).

34. At the time of Gentile's statements, the applicable rule copied the original Rule 3.6 verbatim. *See* NEV. SUP. CT. R. 177 (1991), *quoted in Gentile*, 501 U.S. at 1060-62. *See supra* note 5 for the text of the original Rule 3.6.

35. *Gentile*, 501 U.S. at 1033.

36. *Id.* at 1039-40.

publicity adverse to his client,[37] Gentile carefully planned a press conference during which he read a prepared statement and answered questions.[38] Part of Gentile's preparation included an evening's research into Nevada's disciplinary rules.[39] The Court noted that Gentile apparently believed he had complied with the rules[40] and that his motivation was to prevent circulating press reports from prejudicing a jury against his client.[41]

By a five-to-four margin, with Justice O'Connor casting the swing vote, the Court pronounced the standard embodied in Rule 3.6 constitutional,[42] but declared the rule void for vagueness.[43] In holding that the standard embodied in Rule 3.6 was constitutional, the Court relied heavily on the relationship between attorneys and the judicial system.[44] The opinion distinguished *Nebraska Press Ass'n v. Stuart*,[45] a case concerning commentary about ongoing judicial proceedings, by explaining the difference "between participants in the litigation and strangers to it."[46] As counsel for a defendant, Gentile certainly qualified as a participant and was held to a stricter standard than that which would have been applied to the press and other third parties.

The portion of the opinion that declared the rule void for vagueness, was based on the good faith efforts of Gentile to fit his statements within the rule's "safe-harbor" provision.[47] Justice Kennedy's portion of the majority opinion relied on the notion that the rule "creates a trap for the wary as well as the unwary"[48] and

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37. *Id.* at 1040-41.

38. *Id.* at 1033.

39. *Id.* at 1044.

40. *Id.* at 1049.

41. *Id.* at 1042.

42. *Id.* at 1063.

43. *Id.* at 1048.

44. Chief Justice Rehnquist, in his part of the majority opinion, wrote: "In the United States, the courts have historically . . . exercised the authority to discipline . . . lawyers whose conduct departed from prescribed standards. 'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo . . . ." *Id.* at 1066 (quoting *In re* Rouss, 116 N.E. 782, 783 (1917)). In her concurrence, Justice O'Connor stated the proposition more directly: "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." *Id.* at 1081-82.

45. 427 U.S. 539 (1976).

46. *Gentile*, 501 U.S. at 1072-73. Chief Justice Rehnquist quoted Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), in which the Court recognized that litigants' "First Amendment rights . . . may be subordinated to other interests" in the courtroom setting. *Gentile*, 501 U.S. at 1073.

47. "As interpreted by the Nevada Supreme Court, the Rule is void for vagueness . . . for its safe harbor provision . . . misled [Gentile] into thinking that he could give his press conference without fear of discipline." *Gentile*, 501 U.S. at 1048.

48. *Id.* at 1051.

could precipitate disciplinary actions against those who attempt to comply.[49] Even though the rule's standard passed constitutional muster, the safe-harbor provision invalidated the rule because it was not safe enough.

On August 10, 1994, the ABA House of Delegates amended Model Rule 3.6.[50] The new Rule contains several substantive changes as well as one noteworthy refusal to change.[51]

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49. *Id.* at 1049. Justice Kennedy wrote at some length of the research and careful preparation by Gentile and his associates designed to discover the parameters of the rule and the permissible statements he could make to the press. *Id.* at 1044.

50. The amended Rule 3.6 provides:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
>
> (7) in a criminal case, in addition to subparagraphs (1) through (6):
>
> (i) the identity, residence, occupation and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time and place of arrest; and
>
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
>
> (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
>
> (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

51. One change that will not be addressed within this Note is the addition to Rule 3.6 of paragraph (d). While this new paragraph may have remarkable internal effects on the policies and practices of existing firms and agencies, those effects are beyond the scope of this Note. *See supra* note 50 for the text of amended Rule 3.6.

The most important change in Rule 3.6 concerns the paragraph defining presumptively improper statements. The amendments remove the paragraph from the text of the Rule and include the language in the Rule's official comment, creating a void in the Rule's effective language.[52] Thus, the primary black-letter guideline, not to mention the teeth, of the Rule has become simply a suggested method of enforcement. Other commentators have noted that few boundaries have been set pertaining to permissible extrajudicial statements by attorneys,[53] and the Rule is ineffective as a result.[54] Elimination of the guidelines delineating presumptively improper statements only makes the Rule less effective.

The second major change to Rule 3.6 is within its safe-harbor provision.[55] While retaining the categories of protected statements from the old Rule, the new Rule has eliminated language tending to make the provision difficult to apply.[56] The old Rule limited the attorneys to Rule 3.6(c) statements "without elaboration,"[57] and permitted an attorneys to speak only of the "general nature" of their clients' claims or defenses.[58] Those two phrases in particular were a basis for the holding in *Gentile* that Nevada's application of the rule was impermissibly vague.[59] Writing for the majority, Justice Kennedy maintained:

> The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.[60]

The amended Rule contains neither phrase, and it thus eliminates one of the

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52. Comment 5 to the amended Rule 3.6 states in pertinent part: "There are . . . certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration." The comment quotes verbatim subsections (b)(1) through (b)(6) of the original Rule. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 5 (1994). *See supra* note 5 for the text of the original Rule 3.6. Whether the language "more likely than not" would create any presumption, particularly when only within a comment, remains a debatable issue.

53. *See, e.g.*, Berkowitz-Caballero, *supra* note 8, at 500 ("Model Rule 3.6 . . . must better delineate what speech should be subject to restriction in trial and pretrial contexts."). Indeed, Justice Kennedy's analysis of Model Rule 3.6, embodied in Nevada Supreme Court Rule 177, as void for vagueness was predicated on the lack of "any clarifying interpretation by the state court." *Gentile*, 501 U.S. at 1048.

54. *See generally* Berkowitz-Caballero, *supra* note 8, at 524-37.

55. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1983); *supra* note 5.

56. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1994); *supra* note 50.

57. *See supra* note 5.

58. *Id.*

59. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-49 (1991).

60. *Id.*

principal objections to the propriety of the Rule by removing the language potentially susceptible to discriminatory enforcement.[61] Nonetheless, the amended Rule retains the substance of the very provision which evoked disapproval from the *Gentile* Court, and loses a primary guide to its interpretation and use.

The final and most debatable change in the Rule is the addition of a right of reply.[62] The ability to reply has been hailed as a "necessary and important aspect of the [Rule], as it responds directly to a principal concern raised in *Gentile* by providing lawyers with a means of countering recent publicity which is prejudicial to their client's interests."[63] The right apparently extends to representing attorneys if the publicity to which they are replying was not generated by the attorney or the client, and only to the extent that is necessary to remedy damage to the client's interests.[64]

With this new provision, the ABA has evidently thrown out the baby with the bath water.[65] Though such a right may operate to combat the revelations—both proper and improper—of police and prosecutorial agencies,[66] it is much more likely to exacerbate the problems of protecting the integrity and economy of the adjudicatory system, interests that the *Gentile* Court aimed to safeguard.[67] Moreover, the right of reply offers those lawyers who prefer to litigate in the court of public opinion, rather than within legitimate adjudicatory bodies, an aegis protecting them from professional sanction.[68] Given the number of participants and media parties commenting on a high profile case, it is not difficult to imagine that any statement made by either side would be able to be fit within the right of reply. Consider, for example, the case of *People v. Simpson*. In the two-day

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61. *Id.* at 1051.

62. The right of reply paragraph provides:

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the *substantial undue prejudicial effect* of recent publicity not initiated by the lawyer or the lawyer's client. *A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.*

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994) (emphasis added).

63. Berkowitz-Caballero, *supra* note 8, at 539-40.

64. 1 HAZARD & HODES, *supra* note 9, § 3.6:401, at 676.

65. "If the new version of Rule 3.6(c) is widely adopted in the states and given even a moderately generous interpretation, it will end meaningful attempts to curb the pretrial speech of lawyers participating in high profile cases, especially criminal cases." *Id.*

66. *Id.*

67. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991).

> The . . . test embodied in Rule 177 [Model Rule 3.6] . . . is designed to protect the integrity and fairness of a State's judicial system . . . . The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs [arising from extensive voir dire, venue change, or other methods of ensuring a fair trial] on the judicial system and on the litigants.

*Id.*

68. *See supra* note 65 and accompanying text.

period after the discovery of the murder of Nicole Brown Simpson and Ronald Goldman, at least 65 newspaper articles containing information about the incident had been published.[69] Depending on the content of a given story, both the defense and the prosecution could have legitimately argued that such stories constituted the "substantial undue prejudicial effect"[70] necessary to activate the right of reply. As a result, any comment calculated to counteract that effect would be permissible "[n]otwithstanding paragraph (a)."[71] Adoption of this provision by a state could result in erosion of that state's ability to supervise its attorneys and adjudicatory systems.

## II. STATE INTERPRETATIONS OF RULE 3.6 NORMS

The *Gentile* decision was not intended to affect trial publicity rules outside of Nevada.[72] Each state's rule, therefore, must be judged according to the interpretative guidelines expressed by the state's courts or legislature.

### *A. "Clear and Present Danger" Standard*

Several different standards and constructions have been used by the states. The first standard, and that which is defended by most commentators,[73] is the "clear and present danger" or "serious and imminent threat" standard[74] established in *Markfield v. Association of the Bar of New York.*[75] In *Markfield*, the court considered the appeal of an attorney involved in a criminal case, who was found guilty of professional misconduct (pursuant to DR 7-107)[76] based on his

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69. Search of WESTLAW, Papers Database (Oct. 18, 1994).

70. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

71. *Id.*

72. Justice Kennedy, who wrote the portion of the *Gentile* opinion holding Nevada Supreme Court Rule 177 (Model Rule 3.6) void for vagueness, noted, "The matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a 'substantial likelihood of materially prejudicing an adjudicative proceeding,' but is limited to Nevada's interpretation of that standard." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1034 (1991). However, Justice Rehnquist disputed that position: "We disagree with JUSTICE KENNEDY'S statement .... Petitioner challenged [the rule] as being unconstitutional on its face in addition to as applied .... The validity of the rules in the many states applying the 'substantial likelihood of material prejudice' test has, therefore, been called into question in this case." *Id.* at 1069 n.4. Because Justice Kennedy's statement appeared as a part of the majority opinion, it may be inferred that his position on this point is the Court's position.

73. *See, e.g.*, Berkowitz-Caballero, *supra* note 8, at 542-43; *see generally* Day, *supra* note 8; Campbell, *supra* note 8.

74. The two tests are considered together because they are used to stand for the same concept. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (whether speech will be protected "is a question of proximity and degree" (Holmes, J.)).

75. 370 N.Y.S.2d 82 (N.Y. App. Div. 1975) (per curiam), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975).

76. The differences between the amended Rule 3.6 and DR 7-107 are fourfold. First, Rule

statements made during a panel discussion broadcast over a New York radio station.[77]

Though admitting that a less restrictive standard "would pass constitutional muster,"[78] the court chose to limit application of the rule "to those situations where it is found that the extra-judicial [sic] statements were such as to present a '"clear and present danger" to the administration of justice.'"[79] In dictum, however, the court equates "likelihood of interference" with "clear and present danger" and implies the necessity of a showing of actual prejudice.[80] Thus, the opinion provides other courts with little guidance as to the proper standard and misinterprets the language of the rule.[81]

Other states have addressed the "clear and present danger" test. Oregon, in *In re Porter*,[82] rejected the standard by distinguishing Supreme Court cases such as *Craig v. Harney*[83] and *Pennekamp v. Florida*[84] on the basis that those cases dealt with laymen rather than attorneys.[85] The *Porter* court upheld the application of DR 7-107 with its "reasonably likely" standard.[86] Nevertheless, nine years later the Oregon Supreme Court, in *In re Lasswell*,[87] muddied the waters by "holding that the . . . statements must intend or be knowingly in-different to highly probable serious prejudice to an imminent procedure . . . ."[88] Although by using the terms

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3.6 uses "substantial likelihood" of material prejudice rather than the stricter "reasonable likelihood" standard of DR 7-107. Second, Rule 3.6 clearly limits those subject to the rule to attorneys or their associates who "are, or have been involved in a proceeding." Third, the presumptively improper statements section, substantially the same between DR 7-107 and the original Rule 3.6, has been removed from the text to the comment in the amended Rule. Finally, amended Rule 3.6 grants a right of reply to prejudicial adverse publicity. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1994).

77. *Markfield*, 370 N.Y.S.2d at 84.

78. *Id.* at 85.

79. *Id.* (quoting Craig v. Harney, 331 U.S. 367, 372 (1947)).

80. "Indeed, only where the words used present a clear and present danger, can it be said that there is a likelihood of interference with a fair trial." *Id.*

81. In considering Model Rule 3.6, which, like DR 7-107, revolves around the finding of "likelihood," the *Gentile* Court agreed with the Nevada Supreme Court's conclusion that "'absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice.'" Gentile v. State Bar of Nevada, 501 U.S. 1030, 1069 (1991). Chief Justice Rehnquist's majority opinion focused on the language "likely" and "likelihood." *Id.* at 1075.

82. 521 P.2d 345 (Or. 1974) (en banc), *cert. denied*, 419 U.S. 1056 (1974).

83. 331 U.S. 367 (1947).

84. 328 U.S. 331 (1946).

85. The court stated: "We hold that these opinions are not applicable to the present situation. When one is admitted to the bar he embraces certain ethical considerations and restrictions not required or expected of laymen . . . ." *In re Porter*, 521 P.2d at 349.

86. *Id.*

87. 673 P.2d 855 (Or. 1983).

88. *Id.* at 858 n.3. *Lasswell* may be distinguishable on the basis that the court considered the degree of culpability of the attorney making the statements, not necessarily the degree of

"serious" and "imminent" the court injected uncertainty as to the test to be applied, Oregon may be considered a state that subscribes to the "clear and present danger" test.

### *B. "Substantial Likelihood" Standard*

Several states use the "substantial likelihood" test affirmed in *Gentile*. The Wisconsin Supreme Court used a "reasonable likelihood" test in upholding sanctions against an attorney in *In re Eisenberg*.[89] The court held that the standard "strikes an appropriate balance between a lawyer's right of free speech and an accused's right to a fair trial . . . [and] promotes the public's interest in the fair administration of justice."[90] The court also recognized that the rule had been changed to incorporate the "substantial likelihood" standard and validated it, rejecting the amicus argument of the Wisconsin State Public Defender urging adoption of the stricter "clear and present danger" test.[91]

Similarly, the New Jersey Supreme Court pronounced a test resembling "substantial likelihood" in *State v. Van Duyne*.[92] Though the defendant did not allege error in his conviction for murder based on prejudicial remarks made by prosecutors to the press, the court took the opportunity to set new guidelines for explication of the rule governing releases of information to the media.[93] The court interpreted the rule in force[94]

> to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused . . . . Such statements *have the capacity to interfere with a fair trial* and cannot be countenanced. . . . The ban on statements . . . applies as well to defense counsel.[95]

It may be argued that the *Van Duyne* test more closely approximates a "clear and present danger" standard.[96] However, the weight placed on the accused's right to a fair trial and the prevalence of "trial by newspaper" demonstrates a keen interest in limiting commentary which presents a substantial likelihood of material prejudice.[97] The New Jersey court's desire to establish "a broader and more

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likelihood of prejudice.

89. 423 N.W.2d 867 (Wis. 1988). The rule in question in *Eisenberg* was an earlier trial publicity rule, Wisconsin Supreme Court Rule 20.41, which contained "substantially the same kind of information" as Model Rule 3.6. *Id.* at 873-74 & n.3.

90. *Id.* at 874.

91. *Id.* at 874 n.4.

92. 204 A.2d 841 (N.J. 1964), *cert. denied*, 380 U.S. 987 (1965).

93. *Id.* at 852.

94. The New Jersey Supreme Court considered specifically Canons 5 and 20 of the ABA CANONS OF PROFESSIONAL "ETHICS" (1908). *Van Duyne*, 204 A.2d at 852.

95. *Van Duyne*, 204 A.2d at 852 (emphasis added).

96. *See supra* note 74 and accompanying text.

97. *Van Duyne*, 204 A.2d at 850.

stringent rule"[98] suggests that a wider scope of statements would be prohibited.[99]

### *C. "Reasonable Likelihood" Standard*

Several states have retained the "reasonable likelihood" standard of DR 7-107 in their trial publicity rules.[100] The Tennessee Supreme Court, in *Zimmermann v. Board of Professional Responsibility*,[101] used a traditional two-prong analysis to consider "whether a substantial governmental interest is furthered by the restriction" and "'that the restriction be no greater than is necessary . . . to protect the governmental interest involved.'"[102] The court characterized the governmental interest as "the fairness and integrity of the administration of justice," especially criminal justice.[103] Additionally, because the restrictions applied to a limited class, which has "a unique role and responsibility . . . and, therefore . . . an extraordinary power to undermine or destroy the efficacy of the criminal justice system," and limits only speech "'reasonably likely to interfere with or affect a fair trial," they met the test of the latter prong as well.[104]

The court in *Zimmermann*, however, further opined that the differences between "clear and present danger" and "reasonable likelihood" are "more semantical [sic] than real."[105] The guidelines are to be found in the use of the term "reasonable," which the court considered to make the rule explicit.[106] Here, as in *Markfield*, the court muddied the water to some extent.[107] Nevertheless, if the inference is made that the *Zimmermann* court intended to use the jurisprudentially accepted concept of reasonable (the "reasonable attorney"), the rule is clear

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98. *Id.* at 852. The court's rule is "broader and more stringent" compared to a rule adopted by one New York district attorney simply "prohibiting release of confessions to newspapers prior to trial." *Id.*

99. In Sheppard v. Maxwell, 384 U.S. 333 (1966), a leading case regarding trial publicity (*see* Berkowitz-Caballero, *supra* note 8, at 506-08), the Court ties the *Van Duyne* holding together with "prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests . . . or like statements *concerning the merits of the case*." *Sheppard*, 384 U.S. at 361 (emphasis added). It may be inferred that, at the least, the Court considered *Van Duyne* to stand for the proposition that extrajudicial statements concerning the merits were presumptively prejudicial, and that a showing of "substantial likelihood" was all that was needed.

100. These include: Delaware (*see* Hughes v. State, 437 A.2d 559 (Del. 1981)); Ohio (*see* State v. Ross, 304 N.E.2d 396 (Ohio Ct. App. 1973), *appeal dismissed*, 415 U.S. 904 (1974)); Oklahoma (*see* Holdge v. State, 586 P.2d 744 (Okla. Crim. App. 1978)); South Carolina (*see In re* Delgado, 306 S.E.2d 591 (S.C. 1983), *cert. denied*, 464 U.S. 1057 (1984)); and Washington (*see* State v. Bonner, 587 P.2d 580 (Wash. Ct. App. 1978)). *See also supra* note 4.

101. 764 S.W.2d 757 (Tenn. 1989), *cert. denied*, 490 U.S. 1107 (1989).

102. *Id.* at 761 (quoting *In re* Rachmiel, 449 A.2d 505, 510 (N.J. 1982)).

103. *Id.*

104. *Id.*

105. *Id.* at 763.

106. *Id.*

107. *See supra* notes 75-81 and accompanying text.

enough to be enforced.

Pennsylvania, in *Widoff v. Disciplinary Board of the Supreme Court of Pennsylvania*,[108] also explicitly accepted the "reasonably likely" standard of DR 7-107 in the context of an administrative proceeding. In *Widoff*, an attorney sought a declaratory judgment holding the "reasonably likely" standard unconstitutional on the basis of vagueness and overbreadth.[109] The attorney's arguments, which called for the "clear and present danger" test suggested in *Hirschkop v. Snead*[110] and *Chicago Council of Lawyers v. Bauer*[111] were rejected by the court.[112] Using the traditional state interest and necessary means analysis,[113] the court held "that the 'reasonable likelihood' language defines the degree of constitutional protection necessary to ensure the fairness of any tribunal."[114] Given the greater stakes involved in a criminal (as opposed to administrative) proceeding and the concomitant greater need for fairness,[115] clearly the *Widoff* holding would extend to criminal trials.

### *D. Other Factors*

Other factors considered within Rule 3.6, including the class of attorneys affected, the timing of extrajudicial statements, what constitutes an extrajudicial statement, and the type of showing required to establish likelihood of prejudice, have also been examined by various courts. The class affected by amended Rule 3.6 may be thought obvious: "[a] lawyer who is participating or has participated in the investigation or litigation . . . of a matter"[116] and a "lawyer associated in a firm or government agency with [such] lawyer . . . ."[117] Nonetheless, a New York court expanded the class in *People v. Buttafuoco*.[118] The court examined the New York trial publicity rule which circumscribes "the conduct of a lawyer 'participating in or associated with a criminal . . . matter.'"[119] In a notorious case in which the defendant's wife was not the victim of the defendant's alleged

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108. 420 A.2d 41 (Pa. Commw. Ct. 1980), *aff'd sub nom.* Cohen v. Disciplinary Board of the Supreme Court of Pennsylvania, 430 A.2d 1151 (Pa. 1981), *cert. denied*, 455 U.S. 914 (1982).

109. *Id.* at 42.

110. *See supra* note 22 and accompanying text.

111. *See supra* notes 19-21 and accompanying text.

112. *Widoff*, 420 A.2d at 47.

113. *See* Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757, 761 (Tenn. 1989); *supra* notes 101-106 and accompanying text.

114. *Widoff*, 420 A.2d at 45.

115. "Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 6 (1994).

116. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994); *supra* note 50.

117. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994); *supra* note 50.

118. 599 N.Y.S.2d 419 (Nassau County Ct. 1993).

119. *Id.* at 422.

conduct, but was nevertheless intimately concerned with that conduct,[120] the judge concluded that, given the facts of the case, including the wife's attorney's intent to use the media improperly,[121] the attorney was "associated with" the case for the purposes of the rule.[122] The judge reasoned, "[h]ad the drafters intended to limit [the rule's] provisions solely to attorneys prosecuting and defending actions, the Rule would so provide."[123] By adopting that line of thought with respect to the amended Rule 3.6, it is possible for courts and disciplinary boards to define the class of affected attorneys beyond those actually representing parties in the proceeding.

The timing of extrajudicial statements was of special concern to the minority in the *Gentile* decision. Justice Kennedy commented on the petitioner's decision that the timing of his remarks would be such as to avoid any finding of prejudice.[124] He noted further that, in the case and the trial venue at issue, the exposure of the public to the statement six months prior to trial "would not result in prejudice."[125]

The Supreme Judicial Court of Massachusetts has also imparted guidelines in dictum as to the timing of attorney remarks. In *Elder v. Commonwealth*,[126] the defendant in a bench trial claimed that public statements regarding the trial judge made by the prosecutor while the decision in the case was pending were prejudicial to his fair trial rights.[127] In denying the defendant's request for relief, the court nonetheless took the opportunity to note that the prosecutor's "choice, as to the time to speak, impeded the interests of the court and the defendant, as well as the . . . public interest . . . ."[128] Though concrete guidelines are not the answer,[129] these two cases give practitioners a good idea of the acceptable timing of extrajudicial statements.

As with the class of attorneys affected by the amended Rule 3.6, what constitutes an extrajudicial statement would appear to be sufficiently defined by common sense. Direct oral statements, such as press conferences or interviews,

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120. The defendant was charged, *inter alia*, with endangering the welfare of a child and six counts of rape. *Id.* at 420-21. The victim of the defendant's conduct allegedly injured the defendant's wife. *See generally* Susan Forrest, *A Teen 'Obsessed', Girl, 17, Confesses to Shooting Lover's Wife, Cops Say*, N.Y. NEWSDAY, May 23, 1992, at 3.

121. *Buttafuoco*, 599 N.Y.S.2d at 422.

122. *Id.*

123. *Id.*

124. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1044 (1991).

125. *Id.*

126. 431 N.E.2d 571 (Mass. 1982).

127. *Id.* at 573.

128. *Id.* at 576.

129. Both courts, in *Gentile* and in *Elder*, embraced a case-by-case analysis in trial publicity cases. "[T]he [r]ule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing *that proceeding*." *Gentile*, 501 U.S. at 1076 (emphasis added). *See also Elder*, 431 N.E.2d at 576 (noting the uniqueness of the circumstances of extrajudicial commentary).

certainly fit within the rule.[130] Questions have arisen, however, regarding the release of printed matter. In *Bludworth v. Palm Beach Newspapers, Inc.*,[131] a district attorney appealed an order requiring him to release certain information previously furnished to counsel for the defense.[132] The appellant asserted that such a release, mandated by prior case law, constituted an extrajudicial statement and would conflict with the Florida trial publicity rule.[133] The court did not recognize the conflict "when the state attorney releases documents procured or created during a criminal investigation and eschews any elaboration on them."[134] Though apparently in dictum, because it was not crucial to the outcome of the case, the court concluded with the forceful statement that "[w]e do not see how releasing an investigatory document constitutes making an 'extrajudicial statement.'"[135]

The Arizona Supreme Court, in *Cox Arizona Publications, Inc. v. Collins*,[136] relied on the reasoning of *Bludworth* in a case in which the prosecutor cited Rule 3.6 in refusing to release public records.[137] While noting that public records generally are exempt from the Rule,[138] the court issued a warning that no "public official is free to release investigative reports or other public records with impunity. . . . 'We have always recognized that an "unlimited right of inspection might lead to substantial and irreparable public or private harm . . . ."'"[139] Thus, there is precedent either for a blanket consideration of documents as beyond the scope of Rule 3.6, or for a case-by-case analysis.[140]

Finally, there remains the question of how to consider the amended Rule's prejudice factor. While carefully stating the Rule's import in terms of likelihood of prejudice at the time of the statement,[141] Justice Kennedy's view of the proper

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130. *See, e.g., Gentile*, 501 U.S. at 1030; *Elder*, 431 N.E.2d at 571 (press conferences); Markfield v. Association of the Bar of New York, 370 N.Y.S.2d 82 (N.Y. App. Div. 1975) (per curiam) (interviews).

131. 476 So. 2d 775 (Fla. Dist. Ct. App. 1985).

132. *Id.* at 776.

133. *Id.* at 780. Florida's trial publicity rule at the time of the *Bludworth* decision was DR 7-107. *Id.*

134. *Id.*

135. *Id.*

136. 852 P.2d 1194 (Ariz. 1993).

137. *Id.* at 1198.

138. *Id.* at 1199.

139. *Id.* (quoting Mitchell v. Superior Court, 690 P.2d 51, 53 (Ariz. 1984)).

140. It should be noted that both the *Bludworth* and the *Collins* opinions had the additional backing of statutory or case law requiring the release of certain records. Though the decisions were made based on the view that the documents were not within the scope of Rule 3.6, an alternative ground may be proposed, namely that the rules of professional conduct were pre-empted by other law. There is no specific language in either case to suggest that interpretation, however, and it will not be addressed here.

141. In stating his opposition to the *Gentile* holding (that the standard of the original Rule 3.6 was acceptable), Justice Kennedy argued: "The record does not support the conclusion that petitioner knew or reasonably should have known his remarks *created a substantial likelihood* of

outcome in *Gentile* relied to a large extent on the lack of prejudice-in-fact to the proceeding. Gentile, he wrote, "spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice" to the interests of either his client or the State of Nevada.[142] Given a recent decision regarding trial publicity,[143] in which the Court held that the "barrage of publicity" to which the community had been subjected "did not rise even to a level requiring questioning of individual jurors about the content of publicity,"[144] Justice Kennedy went so far as to say that the Nevada court's finding of likelihood of prejudice was "most unconvincing."[145] He also noted the lack of any prejudice-in-fact.[146]

Other courts have also confronted this issue. The Oregon Supreme Court made its view explicit: "The [extrajudicial statements] rule deals with purposes and prospective effects, not with completed harm."[147] The Oregon court took the position that disciplinary inquiries were to be concerned with the circumstances at the time of the making of the statement, and the actual impairment of a proceeding was not an issue.[148]

The picture is a bit smoggier in New York. The *Markfield* court stated its belief that DR 7-107 should be applied to situations "where it is found that the extra-judicial [sic] statements *were* such" as to endanger justice.[149] The court's reasoning in removing sanctions against Markfield, however, included statements indicating consideration of both the potential and the actual effect of the statements.[150] There is precedent, in New York at least, for the judgment of a court on a disciplinary issue to be tempered by the actual outcome of the underlying case.

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material prejudice . . . . Neither the disciplinary board nor the reviewing court explain any sense in which petitioner's statements had a substantial likelihood of *causing* material prejudice." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1037-38 (1991) (emphasis added). These statements, alluding to creation and cause, clearly evidence a look forward to actual prejudice at the trial.

142. *Id.* at 1033.

143. *See* Mu'Min v. Virginia, 500 U.S. 415 (1991).

144. *Gentile*, 501 U.S. at 1039.

145. *Id.*

146. *Id.* at 1044.

147. *In re* Lasswell, 673 P.2d 855, 858 (Or. 1983).

148. *Id.*

149. Markfield v. Association of the Bar of New York, 370 N.Y.S.2d 82, 85 (N.Y. App. Div. 1975) (emphasis added).

150. *Id.* The appellate court noted that the trial judge knew attorney Markfield would be commenting on radio, and did not speak to him about it, suggesting an analysis centering on the potential for prejudice. Unfortunately, the court ended its reasoning with the statement that the trial judge "did not think the [comments] had any bearing on the conduct of the trial or have an affect [sic] upon the deliberations or thoughts of the jurors or was reasonably likely to do so." *Id.* The latter suggests a prejudice-in-fact analysis, and thus New York's analytical position is uncertain.

## III. THE CASE FOR RETAINING TOUGHER TRIAL PUBLICITY RULES

A stricter view of trial publicity rules affecting the extrajudicial speech of representing attorneys should be adopted for several reasons. First, as officers of the court, attorneys speaking outside the courtroom must be held to a higher standard because they share the responsibility to the public for orderly, fair, and economical administration of justice.[151] Second, as an advocate, the duty of the attorney is to guide the client through the stages of litigation, protecting the interests of the client within the boundaries of the proceeding.[152]

Justice Rehnquist, in his part of the *Gentile* majority opinion, quoted Justice Cardozo: "'Membership in the bar is a privilege burdened with conditions.'"[153] Justice O'Connor agreed: "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech."[154] Attorneys enjoy the power to go before society's adjudicative bodies to defend interests and assert accountability. It is incumbent upon them to realize the responsibilities that such power requires.

As an officer of the court, the attorney is no less responsible than a judge or other arbiter for assuring the fair administration of justice. In fact, the Tennessee Supreme Court considered the lawyer's "vital role in the preservation of society" as a reason for upholding sanctions against an attorney.[155] While the judge is, of course, the final word on the law in a jury trial, the adversary system calls upon attorneys to present the most compelling evidence and arguments so as to facilitate arrival at the truth.[156] To curb that adversarial nature and prevent unfair advantage, rules must be established; after all, the goal of the legal system is for justice to be done, not for the overpowering to flatten the competition. The ends do not justify the means, and therefore rules of procedure, evidence, and professional responsibility have been promulgated and enforced.

In the language of constitutional scholars, fair administration of justice is without question a legitimate and substantial state interest.[157] The Model Rules of

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151. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074-75 (1991).

152. "Part 3 [of the Model Rules of Professional Conduct] draws heavily upon Canon 7 of the Code of Professional Responsibility, copying verbatim many of its specific commands, but also capturing its essential teaching that lawyers must represent clients 'zealously,' but '*within* the bounds of law.'" 1 HAZARD & HODES, *supra* note 9, § 3.102, at 537.

153. *Gentile*, 501 U.S. at 1066. Justice Cardozo made the statement in *In re* Rouss, 116 N.E. 782, 783 (N.Y. 1917), and it was also quoted in Theard v. United States, 354 U.S. 278, 281 (1957).

154. *Gentile*, 501 U.S. at 1081-82 (O'Connor, J., concurring). *See also In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring).

155. Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757, 762 (Tenn. 1989).

156. *See* Murray L. Schwartz, *The Zeal of the Civil Advocate, in* THE GOOD LAWYER 150, 153-54 (David Luban ed., 1983).

157. *See Gentile*, 501 U.S. at 1075 ("the integrity and fairness of a State's judicial system" is a legitimate and protectible interest).

Professional Responsibility, like the Code and the Canons before them, foster that interest by requiring the development of professional ability and obedience to ethical norms. However, critics of Rule 3.6 and its predecessors have argued that Rule 3.6 is not the "least restrictive means" of protecting the fair administration of justice. First, they claim that the Rule, as it stands with the "substantial likelihood" criterion embedded in it, is too restrictive of First Amendment rights on its face.[158] In addition, critics argue that given the nature of the technology available and the lack of constitutional restrictions on third parties to the litigation, Rule 3.6 does not serve the purpose of protecting adjudicative proceedings.[159]

The *Gentile* Court and the state courts that have passed on the issue make it clear that the "substantial likelihood" standard is constitutionally permissible.[160] Indeed, as has previously been shown, several states have permitted a more restrictive test regarding attorney speech to stand.[161] Further, several courts have distinguished prior restraints[162] from rules of professional conduct.[163] The Tennessee Supreme Court, for example, made the distinction based on the purpose of the rules; they were "to discipline and not to punish."[164] The standard that has been used with respect to gag orders and prior restraints was stated in these words by the Court in *Nebraska Press Ass'n v. Stuart*:[165]

> [In order to suppress press commentary on evidentiary matters, the state would have to show that] further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.[166]

The Court in *Gentile* held such a standard to be inapplicable to disciplinary rules by distinguishing press restraints from attorney restraints, particularly in view of the historical regulation of the practice—and practitioners—of law by courts.[167]

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158. *See generally* Day, *supra* note 8; Campbell, *supra* note 8.

159. *See* Berkowitz-Caballero, *supra* note 8, at 524-28.

160. *Gentile*, 501 U.S. at 1075.

161. *See supra* notes 100-115 and accompanying text.

162. Broadly defined, a prior restraint is a prohibition by public officials of the "use of a forum in advance of actual expression." Sixteenth of Sept. Planning Comm., Inc. v. City of Denver, 474 F. Supp. 1333, 1338 (D. Colo. 1979) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).

163. *See, e.g.*, National Broadcasting Co. v. Cooperman, 501 N.Y.S.2d 405, 409 (N.Y. App. Div. 1986) (prior restraints are imposed by a trial court); Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757, 761 (Tenn. 1989); *In re* Eisenberg, 423 N.W.2d 867, 871-74 (Wis. 1988).

164. *Zimmermann*, 764 S.W.2d at 761.

165. 427 U.S. 539 (1976).

166. *Id.* at 569.

167. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1065-66 (1991). *See also* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.").

As a result, the Rule does not overly restrict the rights of free speech.

Further, the *Gentile* Court also noted that First Amendment rights are not eradicated by the Rule; rather, the Rule "merely postpones the attorneys' comments until after the trial."[168] Questions of prejudice are properly raised within the trial court (using procedures for venue change, closing of proceedings, or court orders to follow rules of professional responsibility[169]) and on appeal (e.g., claiming evidentiary error or breach of the Sixth Amendment right to a fair trial), but not in a public media forum. At his press conference, attorney Gentile spoke of his suspicions of police corruption and the role evidence of such behavior would play in the defense of his client.[170] Justice Kennedy seized on that fact, considering the issue to be "the constitutionality of a ban on political speech critical of the government and its officials."[171] Such a concern properly occupies a main position in Justice Kennedy's reasoning, as it plainly cuts to the very essence of the guarantees of the First Amendment. Nevertheless, appropriate relief from alleged governmental abuses of power will remain available, through either the political or the judicial process, following the trial in which the attorney is participating.

Many commentators have argued that attorneys involved in criminal cases enjoy the usual rights of any other citizen, and as a result cannot be compelled to leave their First Amendment rights at the courtroom door.[172] In order to leave no doubt about the fairness of the trial to both the accused and to the people, however, the original Rule 3.6[173] must be followed. Commentary concerning the trial or the rights of the litigants must be made in court so as to be subjected to the proper rules of procedure and evidence and to be preserved for possible appeal. Outside commentary must be delayed until after the trial is concluded. Although studies and the Supreme Court may indicate that it is difficult to in fact prejudice a trial,[174] the casting of any doubt whatsoever on the fairness of the process must be avoided. In this situation, the right to a fair trial, for both society and the defendant, must receive greater weight than a temporary burden on an attorney's

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168. *Gentile*, 501 U.S. at 1076.

169. *See, e.g.*, United States v. Cutler, 815 F. Supp. 599 (E.D.N.Y. 1993) (hearing on motion to dismiss contempt charges stemming from court order to follow disciplinary rules); United States v. Cutler, 840 F. Supp. 959 (E.D.N.Y. 1994) (conviction of those charges), *aff'd*, 58 F.3d 825 (2nd Cir. 1995).

170. *Gentile*, 501 U.S. at 1059 (appendix to opinion of Kennedy, J.).

171. *Id.* at 1034.

172. *See* Lester Porter, Jr., *Leaving Your Speech Rights at the Bar*—Gentile v. State Bar, 67 WASH. L. REV. 733 (1992); *see also Gentile*, 501 U.S. at 1072-73.

173. *See supra* note 5.

174. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415 (1991) (trial of convicted murderer, who committed another murder while out of prison on a work detail, was not prejudiced by local news media publicity even though eight of the twelve jurors admitted reading or hearing something of the case but averred that they had formed no opinion as to guilt). *See also* Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests about the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989).

free speech rights.[175]

Commentators have also argued that Rule 3.6 and its kin conflict with other rules of professional conduct, particularly the admonition to attorneys to zealously represent the interests of the client.[176] The argument is that, in a high-publicity case, the client's interests may include protection of his reputation within the community.[177] That point of view, however, ascribes to the law profession a task outside its ambit. Trial lawyers, in general, are not trained in media relations; their expertise is to be found in considering tactics and strategy within the courtroom, in presenting and objecting to evidence, and in eloquent argument before jury and judge. Lawyers are certainly in the business of representation, and as such may be called upon in many situations to make statements on behalf of their clients. Nevertheless, avoiding risk of prejudicing a trial or hampering the administration of justice must be the primary concern of all parties to criminal litigation.[178]

Finally, critics of Rule 3.6 and the *Gentile* opinion have asserted that proscription on extrajudicial comments by attorneys has very little effect on the volume and quality of publicity surrounding a trial. There is considerable weight in that argument, as evidenced by the California trial of *People v. Simpson*.[179] Even if the defense team and the Los Angeles County District Attorney's Office were held to the present standard of Rule 3.6, the numerous witnesses, law enforcement officers, family members, and others with some knowledge of the case could not be prohibited from speaking to local or national media without a showing of clear and present danger to the fairness of the trial.[180] Considering also

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175. "But [freedom of discussion] must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'" Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966) (quoting Cox v. Louisiana, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

176. *See, e.g.*, 1 HAZARD & HODES, *supra* note 9, § 3.102, at 537; Berkowitz-Caballero, *supra* note 8, at 532-34.

177. *See* Berkowitz-Caballero, *supra* note 8, at 532-35. Recall, too, former Labor Secretary Raymond Donovan's quote after his acquittal on criminal charges: "Which office do I go to get my reputation back?" George Lardner, Jr., *Bronx Jury Acquits Donovan; Ex-Labor Secretary, Codefendants Cleared of Larceny Charges*, WASH. POST, May 26, 1987, at A1.

178. "'As officers of the court . . . attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.'" Gentile v. State Bar of Nevada, 501 U.S. 1033, 1074 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (Brennan, J., concurring)). Further, Chief Justice Rehnquist pronounced the state's interest "in preventing officers of the court . . . from imposing such costs [of extensive voir dire or change of venue] on the judicial system and on the litigants." *Id.* at 1075.

179. People v. Simpson, No. BA097211 (Los Angeles County Super. Ct. filed Sept. 27, 1994).

180. This is the standard enumerated in *Nebraska Press Ass'n*, 427 U.S. at 569. *See supra* note 166 and accompanying text.

the number of media outlets reporting on the Simpson trial,[181] it may seem like a futile gesture to prohibit attorneys from throwing bread crumbs of information to well-fed media pigeons.

The goal of Rule 3.6 is to prevent comments that are apt to influence a trial's result or prejudice potential jurors.[182] The likelihood of prejudice from attorney statements comes primarily from the fact that an attorney representing a party, and presumably intimately familiar with the facts and the theory of the case, is doing the speaking.[183] In their role as advocates, attorneys have "extraordinary power to undermine or destroy the efficacy of the criminal justice system."[184] Whereas the number of sources of information may be quite large, it may be very difficult to find a more authoritative source than a lawyer involved in the case.[185] Thus, while it is admitted that the volume of attorney statements in a high-publicity trial may be small relative to the total commentary, it is maintained that such statements are more likely to be prejudicial because of their source.

In order to make existing and future trial publicity rules more palatable to courts and attorneys, certain procedural and substantive changes in the application of the rules must be made. Initially, if the publicity surrounding a trial is an issue to the court or to counsel, a determination must be made early in the proceeding as to whether the danger of prejudice exists, regardless of the test used. If it is found that a substantial likelihood of material prejudice does exist, litigants' attorneys will then have abundant warning to consider carefully their out-of-court statements. To assist in that early determination, state courts of last resort, legislatures, and bar disciplinary boards within jurisdictions using Rule 3.6 must clarify their interpretations of its provisions.

What constitutes "substantial likelihood of material prejudice" must also be determined as early as possible in a given criminal proceeding. The trial court may wish to consider the issue *sua sponte* as its first order of business, or it may prefer to wait until other questions are examined at an arraignment or pretrial hearing. As shown by the *Simpson* case, it would be preferable to make the determination prior to jury selection.[186]

Three factors should be considered with respect to the definition in a given case of "substantial likelihood of material prejudice." First, the volume and

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181. In addition to the three major national television networks (ABC, CBS, and NBC), several cable television networks (such as CNN and ESPN) and radio networks (such as National Public Radio), numerous production companies for syndicated television programs such as *Entertainment Tonight, Inside Edition*, and national talk shows have taken part in reporting on the trial.

182. *Gentile*, 501 U.S. at 1075.

183. *Id.* at 1074.

184. *Id.* (quoting *In re* Rachmiel, 449 A.2d 505, 511 (N.J. 1982)).

185. *Id.*

186. In the Simpson proceedings, the trial judge's first assessment of the impact of trial publicity came as the parties and the jury pool were preparing for voir dire. By that time, unsubstantiated stories and evidence which was unlikely to be admissible had found their way into print; additionally, voir dire was slowed remarkably by arguments over publicity issues.

nature of the publicity surrounding the trial at the time of the determination must be the foremost consideration. Large numbers of news organizations, continuous coverage of the proceedings and the participants, the existence of unsubstantiated stories within the media, and the publishing of substantial works of literature or film whose subject is the matter under adjudication all suggest a high likelihood that the authoritative commentary of a litigant's attorney will influence potential or seated jurors.[187]

Second, the nature of the crime and the venue must be weighed. Large cities, with their correspondingly larger media outlets, may present more opportunity for publicity than smaller towns. Rural areas, on the other hand, may yet be blessed with a scarcity of crime and a notable one may engender sizable notice from the regional media. The nature of the act is at issue as well. A drug-related shooting in a major urban area may not produce tremendous coverage, unless the victim or the alleged perpetrator is a well-recognized person. Petty theft committed in a small town will not receive the same notice as an extraordinary murder or robbery spree.

Finally, the public image of the parties and their representatives must be added to the equation. It is hardly speculation to suggest that the case against Bruno Hauptmann would have amassed less public attention had the victim not been the child of celebrated aviator Charles Lindbergh. Similarly, the *Simpson* case is one in which the publicity is due to the celebrity of the defendant. In a city like Los Angeles, where over 1,000 murders were committed in 1992,[188] it is sadly not the victims which receive attention, but the famous person accused of the act.

Though Rule 3.6 removes its presumptively improper statement language to the official comment,[189] where the "likelihood" determination[190] has been made, the presumptions should be enforced. Justice Kennedy's holding striking down Nevada's application of the 1983 Rule was grounded entirely on the safe-harbor provision of the Rule.[191] His opinion was also emphatic regarding its scope: "The

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187. It may well be argued that such considerations speak more to the issue of whether a statement could reasonably be expected "to be disseminated by means of public communication," rather than whether there exists "substantial likelihood of material prejudice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1994); *see supra* note 50. It has been held, however, that the public communication requirement applies to the means by which the lawyer makes the statement, not the publicity surrounding the trial. In State v. Bonner, 587 P.2d 580 (Wash. Ct. App. 1978), the court found a comment believed by the attorney to be off the record could not reasonably be expected to be publicly communicated. *Id.* at 585.

188. *See generally* Scott Harris, *Getting Away with Murder, 42% of the Time*, L.A. TIMES, Apr. 28, 1994, at B3 (Los Angeles Police Department investigates over 1,000 homicides each year); Vicki Torres, *Dead-End Cases Pile Up*, L.A. TIMES, Feb. 10, 1994, at J10 (in 1992, 1,094 murders were investigated by the Los Angeles Police Department and an additional 565 by the Los Angeles County Sheriff's Department).

189. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 5 (1994), *supra* notes 50-52 and accompanying text.

190. *See supra* notes 182-187 and accompanying text.

191. Gentile v. State Bar of Nevada, 501 U.S. 1033, 1048 (1991).

matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding . . . ."[192] The question of the propriety of presumptively improper statements appears, therefore, to be open. To prevent the traps to which Justice Kennedy alluded,[193] states should retain within their disciplinary rules the presumption of impropriety.[194]

## CONCLUSION

It is certainly true that the facts of history tend to recur; the only changes are the names of the parties involved. Accordingly, the high-profile cases involving Dr. Samuel Sheppard[195] and Billie Sol Estes [196] can be found in the present; the names have become Simpson, Menendez, Tyson, and Buttafuoco. It cannot be denied that doubt is cast upon notable trials each year by the comprehensive and pervasive brand of publicity that follows such proceedings.

This Note does not challenge the critical place of the freedoms enjoyed by citizens and media alike to speak with a bare minimum of encumbrances about issues which reach the most noble and the most prurient aspects of human character, however those terms may be defined. Nevertheless, when the capacity of a court of law to render an unbiased decision is called into question—even in the smallest way, in law, in fact, or in common sense—steps must be taken to address the problem.

The potential for harm to a trial from publicity may never be removed, but out-of-court speech of attorneys representing the litigants which affects the trial is a good place to start. The *Gentile* court held that Nevada's attempt was unconstitutional only in practice, not in theory; unfortunately, the ABA may have tossed its trial publicity rule out of the frying pan of criticism and into the fire of uselessness. It is therefore recommended that the states retain statutory language, rules of court, and case law which place the onus on attorneys to conscientiously gauge the content and intended reach of their statements regarding ongoing litigation. As Justice Frankfurter wrote:

> Not a Term passes without this Court being importuned to review . . . substantial claims [which] are made that a jury trial has been distorted because of inflammatory newspaper accounts--too often, as in this case, with the prosecutor's collaboration . . . making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . . This Court has not

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192. *Id.* at 1034.

193. *Id.* at 1051.

194. These statements refer generally to: (1) reputation or witness identity information; (2) possibility of a guilty plea or existence of a confession; (3) opinion as to guilt or innocence; (4) apparently inadmissible evidence; and (5) the fact that a person has been charged with a crime. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983), *supra* note 5.

195. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

196. *See* Estes v. Texas, 381 U.S. 532 (1965).

> yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system--freedom of the press, properly conceived.[197]

In the same way, the protection afforded to freedom of speech, particularly with respect to the traditionally court-supervised profession of lawyer, cannot be permitted to dominate the fair administration of justice.

197. Irvin v. Dowd, 366 U.S. 717, 730 (1961) (concurring opinion).

# A CALL TO ACTION FOR NATIONAL LONG-TERM CARE REFORM: INDIANA'S PRIVATE-PUBLIC COOPERATIVE AS A MODEL

VERONICA L. JARNAGIN* **

## INTRODUCTION

Your seventy-one-year old widowed grandmother has savings and other financial assets of $60,000 in addition to a house and one car, which she owns outright. Meager Social Security benefits, interest from savings, and a survivorship benefit from Grandpa's pension plan[1] constitute her total monthly income of $750. She is in typical health for her age and has Medicare Part B and private medical insurance to supplement acute or catastrophic costs.

The picture just painted might otherwise be a financially rosy one for a person in Grandma's situation. Ironically, she faces a catastrophe that will impair her not only physically, but will also burden her and her family emotionally and financially. As a female over age sixty-five,[2] and particularly because she has no spouse to care for her,[3] Grandma is a likely candidate for some form of extended nursing care. At a national average cost of $37,000 per year,[4] Grandma will have exhausted all of her savings and income to pay for nursing home (or even home health) care in just two years. Medicare will pay less than five percent of her long-

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** This Research is dedicated to my late grandmother, Bernice Bechtel, and to all of her care givers and family members who relentlessly tended to her in and out of the nursing home for more than twelve years; and to my grandmother, Frances Jarnagin, with the hope for continued good health and independence.

1. Grandma is one of the lucky few whose spouse elected the survivorship. Before the Retirement Equity Act of 1984 was passed (Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 26 and 29 U.S.C.)), workers could—and to obtain higher lifetime payouts often would—decline survivorship benefits without consent of the spouse. JOHN R. WOLFE, THE COMING HEALTH CRISIS: WHO WILL PAY FOR CARE FOR THE AGED IN THE TWENTY-FIRST CENTURY? 11 (1993).

2. Half of all women over age 65 will enter a nursing home at least once in their lifetime. Peter Kemper & Christopher M. Murtaugh, *Lifetime Use of Nursing Home Care*, 324 NEW ENG. J. MED. 595, 598 (1991). *See infra* note 21 for more complete demographics.

3. Kemper & Murtaugh, *supra* note 2, at 597. Persons living without spouses have more difficulties with Activities of Daily Living (ADLs) and those living with spouses have fewer ADL deficiencies. AGENCY FOR HEALTH CARE POLICY & RESEARCH, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PUB. NO. 90-3462, FUNCTIONAL STATUS OF THE NONINSTITUTIONALIZED ELDERLY: ESTIMATES OF ADL AND IADL DIFFICULTIES (1990).

4. JOSHUA M. WIENER ET AL., SHARING THE BURDEN: STRATEGIES FOR PUBLIC AND PRIVATE LONG-TERM CARE INSURANCE 1 (1994).

term care costs,[5] her supplemental medical insurance will pay less than one percent,[6] and Medicaid will not pay at all unless and until she is impoverished.[7] Grandma and her family will shoulder about half the burden.[8]

Long-term care (LTC) costs are a significant concern of persons age sixty-five and over—the largest, fastest-growing and wealthiest age group in the United States today.[9] Yet, while national health care reform has been catapulted to the political forefront, none of the proposals respond adequately[10] to the needs of this politically powerful demographic group.[11] Threats of national LTC reform by means of a public program, although silent since the defeat of the Health Security Act,[12] stifled reform developments among the states and in the private insurance market. Although the campaign for public health care reform increased public awareness and debate on financing issues, it hindered the development of solutions by the private sector whose role in the national solution, relative to the public sector's role, is relegated to a residuary and reactionary one.[13] Is there any relief in sight for our nation's senior citizens and their largest economic concern?

Among several models proposed in recent years, and one in which this Note seeks to revive interest, is a state-endorsed program with an emphasis on private insurance and some expansion of public programs that may serve as a model for, if not a solution to, national senior health care reform. The Indiana Long Term Care Program (ILTCP),[14] one of several state "partnership" programs,[15] encourages Grandma to purchase private LTC insurance for the first few years of extended home or institutional nursing care. In return, when the private insurance proceeds are exhausted, an equivalent amount of Grandma's assets, up to the total amount of LTC insurance dollars paid, are protected from Medicaid "spend down" rules.[16] Eligibility for Medicaid is expanded so she is able to receive public

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5. *Id.* at 6. *See also* WOLFE, *supra* note 1, at 59 (In 1986, Medicare paid for only 1.6% of nursing home expenses in the United States.).

6. WOLFE, *supra* note 1, at 60. *See infra* notes 42-44 and accompanying text.

7. *See infra* text accompanying note 50.

8. *See infra* note 41 and accompanying text.

9. MEREDITH A. COTE, *Collective Political Influence of Those Over Age 65*, *in* MATURING SOCIETY IN THE MATURING HEALTH CARE SYSTEM: REPORT OF THE SECOND ROSS HEALTH ADMINISTRATION FORUM 29 (1984).

10. *See infra* notes 88-89, 104-110 and accompanying text.

11. COTE, *supra* note 9, at 29.

12. H.R. 3600, 103d Cong., 1st Sess. (1993) (President Clinton's health care reform proposal introduced into the House of Representatives on Nov. 20, 1993). The full text of President Clinton's proposal, prior to its introduction, can be found at 139 CONG. REC. E2571 (daily ed. Oct. 28, 1993) (statement of Rep. Bonior).

13. *See infra* text accompanying notes 88-92.

14. IND. CODE §§ 12-10-9-1 to -11 (1993 & Supp. 1995); IND. CODE §§ 27-8-12-7 to -7.1 (1993 & Supp. 1995); IND. ADMIN. CODE tit. 760, r. 2-20-1 to -43 (Supp. 1995). *See infra* Part III.A-B.

15. *See infra* notes 111-24 and accompanying text.

16. *See infra* Part I.C. on Medicaid spend down.

assistance for LTC. Grandma benefits by obtaining high-quality insurance coverage and by retaining control of her assets for her own use or to pass on through her estate. The state benefits by reducing or at least containing the drain on its Medicaid budget.[17]

While ILTCP and four other private-public programs are not designed to protect either the indigent or the individual of substantial means, they do provide relief for a large group of America's seniors who have few alternatives. These few programs, which are in their infancy, stalled because they were seen as threats to the public health care reform proposals. Yet, their developmental history and design may provide a framework for either a national program or federal supervision and coordination of similar systems in all states.

This Note will analyze the development of the ILTCP as an example of other private-public cooperatives, critique its shortcomings, and discuss whether it can serve as a model for national action. It will also compare the most prominent alternatives for national LTC reform and why the private-public cooperative system may or may not improve on them. Part I provides background into the immediacy of the LTC problem and the failings of the current financing system. Part II introduces a measuring stick for LTC proposals with discussion of some advantages and disadvantages of public and private solutions. Part III analyzes the ILTCP and its development, along with a presentation of the popular critiques of and the arguments in support of the program. Part IV explains why the private-public mix presented by ILTCP is an integral part of national LTC reform; however, additional ingredients in the form of public and private enhancements are also vital for an effective and more complete solution and are suggested as necessary complements to the ILTCP model. Finally, Part V concludes that private-public cooperatives like ILTCP are critical for defining not only the private sector's role, but also the public sector's role in LTC financing reform and will lead the charge in the coming months and years toward an equitable and efficient solution to senior health care reform.

## I. THE NATIONAL LTC TIME BOMB

### *A. Economic Impact of an Aging America*

An aging America[18] is faced with an extraordinary dilemma: seniors no longer fear death, they fear living too long. Although modern medical technology has improved life expectancy,[19] it has also produced substitute evils in the form of

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17. *See infra* text accompanying notes 198-202 discussing the debate whether ILTCP-type plans reduce, increase or maintain current Medicaid expenditures.

18. The 65-and-older group, now with 31 million members, is 10 times larger than it was in 1900; the 85-and-older group is the fastest-growing age group, with a 33% growth spurt in the 1980s compared to 10% for the rest of the population. Teri Randall, *Demographers Ponder the Aging of the Aged and Await Unprecedented Looming Elder Boom*, 269 JAMA 2331, 2331-32 (1993) [hereinafter *Elder Boom*].

19. *See* WOLFE, *supra* note 1, at 15, 23-24 (life expectancy at age 85, at least by some forecast methods, has increased since the 1970s).

chronic and debilitating illnesses and their associated costs.[20] Two out of five persons who turned age sixty-five in 1990[21] will enter a nursing home at least once in their lifetime, and that probability increases with advancing age.[22] Of those who will enter institutions, fifty-five percent will have total lifetime nursing home use of at least one year.[23]

Baby Boomers, the soon-to-be "Elder Boomers," fear they will out-live their financial assets.[24] Besides the deficiencies in their own long-term savings,[25] Elder Boomers will also be failed by social support programs: Old-Age and Survivor's Income (OASI, commonly referred to as Social Security) will expire in fifty years and Medicare's hospital insurance will be bankrupt in just five years.[26] Compounding this problem is the fact that in the year 2005, the oldest Baby Boomers will only be sixty years old and at the beginning stages of their support needs; in 2030, just thirty-five years away, the Baby Boom population bulge will be out of the work force and into hospitals and nursing homes.[27] Consider, too, that some Elder Boomers face the unprecedented likelihood of caring for their frail, very old parents even in their own old age.[28] The lack of foresight, and for some individuals the inability, to save for future medical needs, and the meager allocation of scarce public resources on the part of government are evidence that "we, as a society, have not yet made adequate preparation to meet the staggering

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20. Even if death is occurring at older ages, that is no indicator that chronic and debilitating illnesses (often referred to as morbidity) are likewise commencing at older ages. Rather, "[i]f the average age at death increases by more than the average age of onset of chronic illness, then the population suffering from chronic illness grows, giving rise to increases in dependency and resource use." *Id.* at 17.

21. Forty-three percent of all persons who turned 65 in 1990 (52% and 33% of older women and men respectively) will enter a nursing home at least once before they die. Kemper & Murtaugh, *supra* note 2, at 597-98 (based on the National Mortality Followback Survey of 1986). Notice that Grandma is among those who turned 65 in 1990.

22. Between ages 65 and 74 there is a 17% chance of nursing home use, 36% from ages 75 to 84. The likelihood jumps to 60% for those over age 85. *Id.* at 596.

23. *Id.* at 597. Additionally, 24% of all persons over age 65 will accumulate up to one year in a nursing home over their lifetime. Nine percent (most of them widowed women) will have total lifetime use of five years or more. *Id.*

24. Jane B. Quinn, *Policies for Old-Age Care*, NEWSWEEK, April 20, 1992, at 62.

25. Baby Boomers' personal savings rate plunged in the 1980s and remains well below the historical standards. WOLFE, *supra* note 1, at 5.

26. U.S. SOCIAL SECURITY BD. OF TRUSTEES OF THE FED. HOSP. INS. TRUST FUND, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 1993 ANNUAL REPORTS (1993); *see also* WOLFE, *supra* note 1, at 1, 3.

27. WOLFE, *supra* note 1, at 4.

28. *Elder Boom*, *supra* note 18, at 2332. "In 1990, there were nine people aged 85 years and over per 100 persons aged 50 to 64." *Id.* That means, assuming for the moment this figure will not increase, nine percent of Elder Boomers may have to care for their elderly parents even while they prepare for their own retirement.

future needs that we in fact consider probable."[29]

### *B. Current Costs and Financing Alternatives*

National expenditures for nursing home and home health care (HHC) costs for 1993 were estimated at more than $74 billion.[30] The average nursing home stay lasts two and one-half years[31] at an average annual cost of $37,000. An important caveat to these and all statistical LTC data currently available is that these numbers do not account for many of the nation's LTC users. Studies have estimated that more than seventy percent of seniors needing LTC receive it informally from unpaid care givers,[32] primarily from their spouses or female family members.[33] Further, nursing homes are being used differently today than ever before. Because Medicare forces patients out of the hospital sooner,[34] nursing homes are often used for short-term, post-hospital-treatment convalescent stays. These short stays may skew what is otherwise a longer nursing home average stay; thus, the average is understated.[35] Absent accurate data on informal care, national LTC consumption statistics reflect primarily nursing home data and, therefore, significantly underestimate costs, levels, and lengths of all other types of LTC provided.

The first payor of nursing home care is often Medicare,[36] but it only pays for a maximum of 100 days for skilled nursing care[37] in a certified facility and only after a hospital admission of three or more days.[38] With these limitations and

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29. WOLFE, *supra* note 1, at 1.

30. *Id.* at 6. By the year 2000, nursing home care in the United States will cost $125 billion. Patrick P. Coll, *Nursing Home Care in 2001*, 36 J. FAM. PRAC. 431, 431 (1993).

31. *Program Overview*, PARTNERSHIP UPDATE (Partnership for Long-Term Care, University of Maryland, Center on Aging, College Park, Md.), Dec. 1994, at 1 [hereinafter PARTNERSHIP UPDATE, Dec. 1994].

32. Teri Randall, *Insurance—Private and Public—a Payment Puzzle*, 269 JAMA 2344, 2345 (1993) [hereinafter *Private-Public Payment Puzzle*]. *See also* WOLFE, *supra* note 1, at 58 ("[T]hree-fourths of the functionally disabled elderly are helped solely by family members, compared to only about one-fifth who are cared for in nursing homes.").

33. Nearly 84% of the noninstitutionalized, disabled elderly received assistance from relatives and friends, sometimes supplemented by paid services. WOLFE, *supra* note 1, at 5-6. Non-paid family LTC services were estimated at more than 27 million unpaid days of informal care each week. *Id.* at 6.

34. *See infra* note 77 and accompanying text.

35. Kemper & Murtaugh, *supra* note 2, at 598.

36. Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended in scattered sections of 26, 42, and 45 U.S.C.). *See infra* notes 77-79 and accompanying text suggesting that Medicare's prospective payment system forces it to be a primary payor of the initial LTC burden.

37. 42 C.F.R. § 409.31 (1994) (skilled care requirements). Custodial care is not covered, even though it is the most common type of long-term care provided. 42 U.S.C. § 1395 (1988 & Supp. V 1993).

38. When these criteria are met, Medicare pays 100% of reasonable skilled nursing home

when most nursing home care is provided on a non-skilled level,[39] it is easy to understand why Medicare paid less than five percent of the nation's LTC costs in 1991.[40]

If the patient does not meet the above criteria or continues to need care past 100 days, she bears 100 percent of the remaining LTC costs. Forty-six percent of national LTC expenditures are borne by LTC patients and their families from their private assets[41] or, if coverage allows, from private medical or LTC insurance.

Private insurance, including LTC insurance, pays less than one percent of all LTC expenses.[42] Besides problems with affordability, factors contributing to this low insurance participation include: 1) general attitudes toward insurance; 2) the inadequacies of "first-generation" LTC products such that benefits were inadvertently or even deliberately "designed out" of the policies;[43] and 3) confusion in the market as to what role and direction the government will take on this portion of health care reform.[44] Whether the private sector participation level will improve depends in large part on the public sector's role and the use of incentives to encourage private LTC insurance protection as the primary payor.

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costs for the first 20 days, then pays a per diem rate ($92.00 in 1996) for the next 80 days, with a co-payment by the LTC cohort. 42 C.F.R. § 409.85 (1994); Medicare Program: Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 1996, 60 Fed. Reg. 53,625 (1995) (1996 rates). Medicare also pays for skilled home care in the form of home health aides, physical, occupational and speech therapy, and medical social work. Laurence G. M. Branch et al., *Medicare Home Health: A Description of Total Episodes of Care*, 14 HEALTH CARE FIN. REV. 59 (1993).

39. Alan M. Kunerth, *Timely Medicine for the LTC Crisis*, BEST'S REV.—LIFE-HEALTH INS. EDITION, January 1992, at 34, 35.

40. WIENER ET AL., *supra* note 4, at 6.

41. PAMELA F. SHORT ET AL., NATIONAL MEDICAL EXPENDITURE SURVEY, EXPENDITURES AND SOURCES OF PAYMENT FOR PERSONS IN NURSING AND PERSONAL CARE HOMES 5 (1994); *Private-Public Payment Puzzle*, *supra* note 32, at 2344-45.

42. WOLFE, *supra* note 1, at 59. Private medical insurance, often provided by employers as a retiree benefit, usually does not cover extended nursing care. *Id.* *See also* Marc A. Cohen et al., *Financing Long-Term Care: A Practical Mix of Public and Private*, 17 J. HEALTH POL. POL'Y 403, 405 (1992).

43. Deficiencies in products as well as marketing abuses have been addressed by the National Association of Insurance Commissioners (NAIC) Long-Term Care Ins. Model Act. *See* 3 OFFICIAL NAIC MODEL INSURANCE LAWS, REGULATIONS, AND GUIDELINES (Nat'l Ass'n Ins. Comm'rs rev. ed. 1993) [hereinafter NAIC MODEL ACT]; and see the following proposed legislation: Long-Term Care Insurance Consumer Protection Act of 1991 (H.R. 1916, 102d Cong., 1st Sess. (1991)); Consumer Protection Standards for Long-Term Care Insurance Act of 1991 (H.R. 2378, 102d Cong., 1st Sess. (1991)); Long-Term Care Insurance Improvement and Accountability Act of 1992 (H.R. 4848 (Title III), 102d Cong., 2d Sess. (1992)).

For helpful advice on selecting LTC insurance see Alfred Hill, Jr., *Standards for Selecting Long Term Health Care Insurance*, TR. & EST., Apr. 1993, at 41; Douglas Shapiro, *Assisting Older Persons With Long-Term Care Insurance Choices*, 25 CLEARINGHOUSE REV. 679 (1991).

44. Cohen et al., *supra* note 42, at 412.

### *C. Saving Up to Spend Down: The Medicaid Anomaly*

After personal assets are depleted or "spent down" on LTC or other health care costs, the private-pay cohort is often converted to a Medicaid cohort. One study found that 12.7 percent of nursing home residents who receive Medicaid assistance were first admitted as private-pay patients—that is, when they entered the facility, they were able to pay for their own LTC costs but soon spent down to Medicaid eligibility.[45] Data from surveys in Wisconsin and Connecticut, however, indicate higher spend-down rates of thirty-five and fifty percent respectively.[46] Although it was designed at its inception to be the payor of last resort, Medicaid[47] now funds forty-five percent of the nation's LTC burden.[48] Medicaid accounted for the largest portion of government spending on nursing homes and home care for the elderly in 1993.[49] Because it is a welfare program, eligibility for Medicaid is limited to those who meet a strict means test: generally, unmarried persons may not own assets (except a home) in excess of $2,000 and must contribute virtually all of their monthly income to help pay for their care.[50] In the past, these "asset

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45. SHORT ET AL., *supra* note 41, at 12. Paul Cotton, *Must Older Americans Save Up to Spend Down?*, 269 JAMA 2342, 2342 (1993).

46. Cotton, *supra* note 45, at 2342; Greg Arling et al., *Medicaid Spenddown Among Nursing Home Residents in Wisconsin*, 31 GERONTOLOGIST 174 (1991); Korbin Liu & Kenneth Manton, *Nursing Home Length of Stay and Spenddown in Connecticut, 1977-1986*, 31 GERONTOLOGIST 165 (1991). A recent study, which disaggregated spend down components, estimated that one-third of Medicaid enrollees were not eligible when admitted and between 30% and 40% of Medicaid expenditures can be attributed to "spend-downers." E. Kathleen Adams et al., *Asset Spend-Down in Nursing Homes: Methods and Insights*, 31 MED. CARE 1, 21 (1993).

47. 42 U.S.C. §1396 (1988 & Supp. V 1993). On average, Medicaid is 69% federally funded and 31% funded by the individual states, although the ratio differs from state to state. Katharine R. Levit et al., *National Health Care Spending, 1989*, HEALTH AFFAIRS, Spring 1991, at 122. Consequently, spend down requirements in each state also differ. *See infra* note 50 for Indiana's spend down requirements for couples.

48. Adams et al., *supra* note 46, at 17.

49. WIENER ET AL., *supra* note 4, at 6.

50. *Id.* at 7; 42 U.S.C. § 1396a (1988 & Supp. V 1993). For married couples, the spouse remaining in the community has a higher asset and income threshold, allowing the couple to keep some assets while the other spouse is institutionalized and receiving Medicaid assistance. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (1988) (codified in scattered sections of 26 and 42 U.S.C.) and Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979 (codified in scattered sections of 26 and 42 U.S.C.) (spousal impoverishment rules were not repealed). In Indiana, as of January 1, 1996, the in-home spouse may retain up to one-half of the couple's non-exempt assets up to a maximum of $76,728 (but not less than $15,346) and $1,254 of the total monthly income. INDIANA CLIENT ELIGIBILITY SYSTEM MANUAL ch. 3000, at 4 (1995); *1996 Spousal Impoverishment Limits*, PARTNERS UPDATE (Indiana Long Term Care Program, Family & Social Servs. Admin., Indianapolis, Ind.), Dec. 1995, at 2. The rest must be contributed to pay the LTC spouse's costs of care.

spend down" guidelines were incentives for some seniors with significant financial resources to transfer assets to family members, trusts or other persons and institutions in order to "look poor"[51] to qualify for Medicaid assistance.[52] For many though, asset spend down is not just a game or loophole scheme; it is a frightful reality. Asset spend down can be as emotionally devastating as an illness can be physically debilitating.[53] "[F]inancial impoverishment, with its attendant restrictions on lifestyle and its dampening of an elder's ability to leave a significant financial inheritance to [his or] her heirs, is perhaps the most feared result of the aging process."[54]

## II. PROPOSALS FOR LTC FINANCING REFORM

Before reviewing some current LTC reform proposals, it is necessary to discuss important considerations for resolving LTC's financing problems.[55] Among these are: 1) educating the public and assuring quality information for decision-makers; 2) defining the scope of LTC; 3) controlling costs; 4) assuring quality of care; and 5) balancing responsibility between the private and public sectors.[56] These factors are revisited later in order to assess the viability of the private-public cooperative programs.

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51. Cotton, *supra* note 45, at 2342 (explaining the anomaly and discussing books on how to exploit loopholes and avoid asset spend down).

52. However, the loopholes have been tightened by the Omnibus Budget Reconciliation Act of 1993 (OBRA-93), which expanded the "look back" period to 36 months for most assets and even longer (60 months) for trusts and other assets. Pub. L. No. 103-66, § 13611(a)(1), 107 Stat. 312, 622 (1993) (amending 42 U.S.C. § 1396p(c)(1) (1988 & Supp. V 1993)); *see also* Patricia Nemore et al., *Just When You Thought You Had Learned the Rules, They Went and Changed Them: OBRA-93 Provisions Concerning Medicaid Transfer of Assets, Treatment of Certain Trusts, and Estate Recoveries*, 27 CLEARINGHOUSE REV. 1199 (1994).

53. "One of the great fears of the elderly is that they will be a burden on their children." Joshua M. Wiener & Raymond J. Hanley, *Long-Term Care Financing: Problems and Progress*, 12 ANN. REV. PUB. HEALTH 67, 70 (1991).

54. Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 719 (1991).

55. Kapp suggests that these same considerations, which are about to be discussed, are the reasons why LTC financing has been treated as a public policy "third rail" and has not been squarely addressed. *Id.* at 733. The same sentiment is shared by Mark R. Meiners, Director of the Partnership for LTC, who says LTC has been the "forgotten stepchild in the health care forum debate." *Long-Term Care Tax Provisions in the Contract with America: Hearings on H.R. 8 Before the Subcomm. on Health of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 6 (1995) (testimony of Mark R. Meiners, Robert Wood Johnson Foundation Partnership for Long-Term Care) [hereinafter Meiners Testimony].

56. Kapp, *supra* note 54, at 733. For additional, disaggregated criteria, see Cohen et al., *supra* note 42, at 412-15.

### *A. Considerations for LTC Financing Proposals*

The first hurdle to clear en route to LTC reform is increasing public awareness about the inadequacy of the current LTC financing system. More importantly, the public must be educated about the probability of needing LTC, its costs and financing mix, and the alternative methods for delivering LTC services. "People seem willing to accept the possibility that they will someday get sick . . . but few people will admit that they face a significant lifetime risk of becoming disabled and using expensive nursing home or home care."[57] Elderly and non-elderly find, often to their surprise, that neither Medicare nor private medical insurance covers LTC costs.[58] Although persons may have some LTC experience within their family, few are knowledgeable about the alternatives of in-home and community care; particularly with services that are covered by Medicare.[59] "The presence of knowledgeable consumers is a necessary condition for the development of an efficient private insurance market."[60]

Not only are individuals misinformed about LTC, but the government and the suppliers of LTC financing also lack accurate data on the actual need for all types and levels of LTC—including informal family-provided home care and the existence of elders who remain at home but do not receive the care they need, formally or informally. Without this information public and private insurers cannot adequately project the use and costs of LTC benefits. For national reform to occur, a new national mindset is needed: the risk of needing LTC is a normal risk of living longer and requires planning on the part of the individual, the community, and the public sector in order to reduce the risk of personal impoverishment.[61]

With the expansion and the interchangeability of the types of LTC delivery, it is equally difficult to identify the field of LTC and to define the level of deficiency in basic activities that triggers the payment of benefits.[62] "It is a daunting task to define the field and determine with the level of specificity demanded by a workable financing scheme what particular services (for example, respite care, adult day care, home personal care attendants) should qualify for

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57. Wiener & Hanley, *supra* note 53, at 72.

58. WIENER ET AL., *supra* note 4, at 2.

59. MARGARET STRAW, AMERICAN ASS'N OF RETIRED PERSONS, HOME CARE: ATTITUDES AND KNOWLEDGE OF MIDDLE-AGED AND OLDER AMERICANS 4-6 (1991). While 41% of the respondents age 45 and older had some experience with LTC, only 47% said they were "fairly-" or "well-informed" about HHC. *Id. See also Challenge of Providing Long-Term Health Care: Hearings Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong., 2d Sess 47 (1992) (statement of Paul Willging, Ph.D, Executive Vice President, American Health Care Association) [hereinafter Willging Statement].

60. Cohen et al., *supra* note 42, at 419.

61. Wiener & Hanley, *supra* note 53, at 83.

62. The NAIC Model Act took some measures against this. *See* NAIC MODEL ACT, *supra* note 43. *See also* WIENER ET AL., *supra* note 4, at 31-32 & n.5.

inclusion or exclusion."[63] It is more manageable to define and include acute care because it is more drastic. The subtler, more intricate services rendered for chronic and debilitating impairments are more difficult to pin down; these services must be better identified and defined if they are to be included in a reformed system.

Cost containment is a chief concern for all Americans, particularly if public entitlement programs like Medicaid or Medicare are expanded to absorb the costs of LTC. When introducing LTC insurance, whether privately[64] or publicly insured, two phenomena that may drive up costs are adverse selection (those who know they will use LTC will disproportionately buy or use the insurance)[65] and moral hazard (insureds are not risk averse).[66] The adverse selection dilemma in private insurance occurs when low-risk individuals choose not to buy the coverage.[67] In the public sector, adverse selection is inherent in the welfare program because the impoverished or lower-income individuals are often at the greatest risk of poor health and have fewer cost-effective, non-nursing home alternatives. Thus, their higher frequency and longer periods of LTC use adversely skew the public program's risk group.[68] "The surest way to avoid adverse selection in health-care or long-term-care insurance is to make insurance available to young consumers, before the emergence of most chronic health problems."[69] The greatest obstacles that prevent the infusion of younger insureds and the normalization of the risk pool are the difficulties: 1) in motivating young, healthy individuals to purchase benefits or participate in public programs, and 2) in projecting thirty or forty years into the future the frequency of LTC use and the effects of inflation on LTC costs.[70]

"Whereas adverse selection is a distortion in the demand for insurance, moral hazard is a distortion in the behavior of those who are already insured, reducing

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63. Kapp, *supra* note 54, at 733. To this confusing mix one should add hospice care, therapeutic equipment, community living services and family-provided services.

64. For a more thorough discussion of the economic affects of these phenomena on private insurance, see WOLFE, *supra* note 1, at 68-92.

65. Wiener & Hanley, *supra* note 53, at 73; WOLFE, *supra* note 1, at 68.

66. *See infra* notes 71-73 and accompanying text.

67. WOLFE, *supra* note 1, at 69.

68. SHORT ET AL., *supra* note 41, at 6-7. The study determined that 55.4% of those with family incomes less than $5000 were institutionalized for the entire year compared with 45.6% of all other income groups; only 3.3% of Medicaid nursing home residents returned to the community and survived there compared to 12.3% of private-pay residents. *Id.*

69. WOLFE, *supra* note 1, at 77 (citing Mark V. Pauly, *What is Adverse About Adverse Selection?*, 6 ADVANCES HEALTH ECON. & HEALTH SERVICES RES. 281-86 (1985)). The earlier insurance is sold, the less chance that young consumers can know their individual chance of illness or disability. Because they cannot know if they are high-risk prospects, they cannot choose to disproportionately buy insurance. Consequently, the risk pool is more normal. *Id.*

70. If actual health care inflation is 2% higher than projected, in 37 years LTC coverage may be grossly underfunded, covering as little as half the actual costs of care. *Id.*

their aversion to losses."[71] The most common form of moral hazard in the public sector is the "woodwork effect": those persons who now cope without public assistance would, upon its expanded availability, "'crawl out of the woodwork' and suddenly 'need' public financial assistance."[72] Their expanded use drives up LTC costs. Two forms of moral hazard exist on the private side where insureds who do not pay out-of-pocket: 1) are less likely to prevent and limit their exposure, and 2) are induced to demand "Cadillac care" in the form of excessive, higher-quality, and more expensive services.[73] While the first problem is difficult to control, the second may be mitigated with more specific payment guidelines for eligible services.

In addition, costs may be controlled through less expensive delivery systems. New forms of LTC delivery have emerged in recent years in the form of adult day care, respite care, community living and home health care (HHC). Today's LTC proposals place a great deal of emphasis on HHC and community care services[74] because they are usually less expensive and, in fact, are preferred by a substantial portion of American seniors.[75] Government officials and their constituents alike have embraced the idea that "[t]he most important long-term care reform that Congress can enact is to eliminate the nursing home bias."[76]

One victim of cost containment is quality of patient care, particularly where caps on public programs like Medicare and Medicaid are involved. Medicare's prospective payment system through diagnosis-related groups (DRGs) results in patients being released from the hospital quicker and sicker,[77] often to nursing

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71. *Id.* at 83.

72. Kapp, *supra* note 54, at 734. Higher quality data on informal LTC use, as discussed above, may help reduce this impact of the moral hazard.

73. WOLFE, *supra* note 1, at 83-84. "Few losses are pure acts of God. In the case of [a privately] insurable medical event, virtually all patients exercise some choice over the care they receive." *Id.* at 83.

74. *See, e.g.*, H.R. 3600, *supra* note 12; THE PEPPER COMMISSION: U.S. COMM'N ON COMPREHENSIVE HEALTH CARE, A CALL FOR ACTION (1990) (final report) [hereinafter PEPPER REPORT].

75. "Mr. Speaker, if you asked most Americans the best way to live out their last days, they'd say they would like to do it quietly at home. If you asked them the worst way to end their lives, they'd say years of bankruptcy and loneliness in a nursing home." 138 CONG. REC. E1025 (daily ed. April 9, 1992) (statement of Rep. Waxman regarding The Long-Term Care Family Security Act, H.R. 4848, 102d Cong., 2d Sess. (1992)). *See also* STRAW, *supra* note 59, at 6-10 (44% of respondents preferred home care by family members and 28% preferred professional HHC services; even if round-the-clock care was needed, respondents preferred HHC).

76. *Long-Term Care and Drug Benefits Under Health Care Reform: Hearings Before the Senate Comm. on Finance*, 103d Cong., 2d Sess. 77 (1994) (statement of Richard C. Ladd, Commissioner, Texas Health & Human Services Commission).

77. Coll, *supra* note 30, at 431; Mathy Mezey & Terry Fulmer, *The Future of Nursing Home Care*, 325 NEW ENG. J. MED. 360, 360 (1991). Under Medicare's Diagnosis-Related Groups (DRGs), payment maximums for medical services are unequivocally stipulated for all diagnoses and treatments. Each specific DRG designates the maximum hospital stay and total fee amounts for

homes for convalescent care. Yet, because Medicare and Medicaid reimbursements do not cover the full cost of care, nursing homes continue to be inadequately staffed.[78] "Not only does Medicaid require very low levels of income and wealth of its recipients, it also makes its beneficiaries second-class nursing home customers by placing a below-market ceiling on the daily reimbursement rates that it will pay."[79] On the contrary, private-pay patients (through personal assets or private insurance) tend to pay full costs and may receive higher quality care. One could conclude that by paying the "full costs,"—that is, elevated rates—private-payors indirectly subsidize public-pay patients. Ideally, any new LTC program would provide equal access to quality services even though the funding mix may differ among patients.

Perhaps the most controversial of all cost issues is the question of how the costs and benefits of a new LTC program will be shared between public and private sources. Underlying the private-public debate, and central to the design of every LTC proposal, is the "Who pays, who benefits?" question which further raises issues of intergenerational inequity[80] and the political unattractiveness of welfare.[81] At one extreme, a plan adopting universal social LTC insurance, regardless of financial need, reaps the advantages of centralized uniformity and efficiency, but it is also unresponsive to local concerns and too large to adapt to

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which hospitals and medical providers will be reimbursed by Medicare. Because hospitals and providers will not be reimbursed for expenses beyond this limit, they discharge the patient sooner even if she has not fully recovered.

78. "Despite a more severely ill population of patients, over the past 10 years such staffing has remained the same or decreased. The average 100-bed nursing home continues to have only 1 registered nurse and 1 ½ licensed practical nurses per shift, and on average each patient receives less than 12 minutes of care from a registered nurse per day." Mezey & Fulmer, *supra* note 77, at 360. This dilemma is compounded by the scarcity of physicians in nursing homes. *Id. See also* Coll, *supra* note 30, at 433 (discussing the current disincentives for physicians to practice in the nursing home environment).

79. WOLFE, *supra* note 1, at 67. *See also* WIENER ET AL., *supra* note 4, at 136.

80. Intergenerational equity proponents claim that older persons already consume more than their proportional share of available public resources and to increase programs for their benefit would short-change younger generations. Kapp, *supra* note 54, at 735. For a more detailed explanation and counter arguments to intergenerational inequity see WIENER ET AL., *supra* note 4, at 136-38. *See also* Robert L. Kane & Rosalie A. Kane, *A Nursing Home in Your Future?,* 324 NEW ENG. J. MED. 627, 628 (1991) (many people are uncomfortable about using public funds in a way that permits the beneficiaries to leave inheritances).

81. According to Wiener, the political downfall of Medicaid is that it is a welfare program. Joshua M. Wiener et al., Comment, *Financing Long-Term Care: How Much Public? How Much Private?*, 17 J. HEALTH POL. POL'Y & L. 425, 430 (1992) [hereinafter *How Much Public?*] (commenting on Cohen et al., *supra* note 42). If both rich and poor were included in a single LTC social program (Wiener supports a primarily social program), the political pull of the group could achieve greater things for the benefit of all its members. The poor would actually benefit from a non-means-tested program. *Id.*

inevitable changes and shifting needs.[82] Although a new or expanded public program would be administratively efficient, the "woodwork effect" could dramatically increase costs. Depending on the method of financing,[83] the cost burden would be shouldered across generations, primarily affecting the young who already contribute to old age programs that may be drained before the young contributors are able to benefit from them.[84]

At the other extreme, the emphasis on a purely private solution, with the government intervening only as a payor of last resort, places responsibility on the patient and her family rather than stretching it across other families and generations. Quality of care improves when the full costs of care are covered, but only those people who can afford to self-insure or pay high LTC insurance premiums can assure themselves the best quality of care. The same people tend to find it politically unpalatable to expand or create another kind of welfare program. In addition, moral hazards are still at work, although in a different form,[85] driving costs up and leaving more and more people out of the private insurance market. Furthermore, the uninsurable are still "uninsurable," at least by the private sector, so the burden falls back on the public sector to provide care. The situation, therefore, is no different than the financing system that exists today.

Realistically, the solution will fall somewhere between these polar positions and will include a mix of coordinated public and private efforts.[86] Once one of the elements in this dynamic relationship becomes known, preferably the public sector

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> There are several advantages to a national solution. Its policies are uniform and centralized, achieve economies of scale, and sufficiently distribute benefits and burdens among its citizens. . . . [The disadvantages are that they] are not tailored to local concerns and variations, are often dominated by special interest groups, and are paralyzed by the scope and complexity needed to make substantive changes.

Tracy Erwin, Note, *The Oregon Plan: An Ethical Solution to the Health Care Crisis?*, 26 J. HEALTH & HOSP. L. 133, 134 (1993) (citations omitted). *See also* Greg Arling et al., *The Feasibility of a Public-Private Long-Term Care Financing Plan*, 30 MEDICAL CARE 699, 716 (1992) [hereinafter Arling Simulation] (Medicare traditionally has had much lower administrative costs than the private insurance industry.).

83. Affirmative taxes on income, like those imposed for OASI (Social Security), OASDI and SMI (Medicare Part A), fuel the intergenerational inequity argument because they are applied across generations. Increased inheritance taxes, while arguably also an intergenerational tax, at least satisfy the "family obligation" concerns because they affect primarily the recipient's family. This death tax to recoup public LTC expenditures, even though distributed across income groups, seems to be politically tolerable for LTC costs. Kapp, *supra* note 54, at 742-43. *See also* Kane & Kane, *supra* note 80, at 628.

84. *See supra* note 26 and accompanying text.

85. *See supra* notes 71-73 and accompanying text.

86. The coordination of public and private already exists in acute care for the elderly, handled jointly by Medicare and Medicare supplement insurance policies, and in disability and retirement income, covered by Social Security (OASDI and OASI) and private insurance and retirement instruments.

element, it will influence and shape the developments in the other sector.[87]

### *B. Public-Private Sector Dynamics*

The developments in 1993 and 1994 demonstrate the degree to which the actions of one sector influence and shape the actions of the other. President Clinton's Health Security Act,[88] and other nearly universal LTC insurance proposals that called for funding by new public programs or an expansion of existing ones,[89] put an interested but skeptical nation at a standstill while it waited to see what role the federal government would eventually take in the LTC solution. Probably on the expectancy that some public LTC reform would emerge from these suggested solutions, and fearing any measures outside the reform package might enlarge Medicaid exposure, Congress inserted a provision in the Omnibus Budget Reconciliation Act of 1993 (OBRA-93)[90] which essentially put a moratorium on state LTC initiatives that worked in conjunction with expanded Medicaid eligibility.[91] Hence, private LTC insurance has not been able to realize its full potential.

> While the number of individuals insured by private insurance companies will continue to grow, the proportion of the population covered by private insurance is likely to remain far below the percentage that could afford to pay for insurance. . . . Unless and until the government clearly defines its own role in this area, most consumers will be reluctant to purchase private insurance.[92]

*1. Public and Public-Private Options.*—Public LTC strategies take many forms along the public-private continuum, from a nearly universal public approach with some incentives for private insurance for those who can afford it,[93] to a more balanced system providing public insurance for either front-end[94] or back-end,

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87. Cohen et al., *supra* note 42, at 406-08.

88. H.R. 3600, *supra* note 12.

89. Among proposals calling for major public financing are The Brookings-ICF Institute Model (Brookings-ICF Model) (*see* WIENER ET AL., *supra* note 4, at 7), the PEPPER REPORT (*supra* note 74; *see also* Kapp, *supra* note 54, at 737-38), and the American Medical Association (*see* Charlene Harrington et al., *A National Long-term Care Program for the United States: A Caring Vision*, 266 JAMA 3023 (1991)).

90. Pub. L. No. 103-66, §§ 13611-12, 107 Stat. 312, 622-29 (1993) (amending scattered sections of 42 U.S.C.). *See infra* notes 125-130. *See also* Nemore et al., *supra* note 52, at 1199.

91. Even in light of OBRA-93's restrictions on asset disregard benefits, two states, Maryland and Illinois, went forward with partnership programs similar to ILTCP. Telephone Interview with Hunter McKay, Deputy Director of The Partnership for Long-Term Care (Jan. 4, 1995) [hereinafter McKay Interview]. *See infra* note 113.

92. Cohen et al., *supra* note 42, at 412.

93. *See, e.g.*, H.R. 3600, *supra* note 12; Brookings-ICF Model, *supra* note 89; PEPPER REPORT, *supra* note 74.

94. *See, e.g.*, PEPPER REPORT, *supra* note 74.

catastrophic costs with private funds covering the rest,[95] to a public subsidy system to help certain individuals pay private LTC insurance premiums.[96] None of the forms are exclusive and combinations of several public initiatives are common.

An example of a primarily public proposal is the Brookings-ICF Institute Model (Brookings-ICF Model)[97] which calls for a social LTC insurance program, most likely through expansion of the Medicare program, that provides universal or near-universal coverage on a non-means-tested basis.[98] In addition, the model liberalizes the financial eligibility requirements for Medicaid "so that it does not require total impoverishment" and, like most of the current proposals,[99] emphasizes a more balanced delivery system with expanded HHC and community care services.[100]

The rationales for the Brookings-ICF Model and other social insurance strategies are: 1) universal coverage normalizes the risk pool and can be accomplished sooner and more efficiently through a public system;[101] 2) because social insurance programs benefit everyone, they enjoy broad public and political support;[102] and 3) a social program would improve access and quality and "would

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95. A prior version of Senator Mitchell's Life Care Bill called for universal HHC coverage, with a modest deductible and co-insurance for an unlimited period of time, and public nursing home insurance coverage only after a two-year "deductible" period in which the individual would self-insure or buy private insurance to cover LTC costs. Wiener & Hanley, *supra* note 53, at 79.

96. *See, e.g.*, S. 1600, 103d Cong., 1st Sess., 139 CONG. REC. S14,629-30 (daily ed. Oct. 28, 1993) (statements of Sen. Packwood and Sen. Dole) (Secure Choice Long-Term Care Bill). *See also* 139 CONG. REC. S16,285 (daily ed. Nov. 19, 1993) (statement of Sen. Simpson). The subsidy targets individuals between 100% and 300% of the federal poverty level (FPL).

97. WIENER ET AL., *supra* note 4, app. A at 191-219; Wiener & Hanley, *supra* note 53, at 69.

98. The Brookings-ICF Model is "in line with, but [is] far more reaching than, the proposals put forth by President Clinton [in the Health Security Act of 1993]." WIENER ET AL., *supra* note 4, at 27.

99. *See, e.g.*, H.R. 3600, *supra* note 12; WIENER ET AL., *supra* note 4; S. 1833, 103d Cong., 2d Sess., 140 CONG. REC. S1318-19 (daily ed. Feb. 10, 1994) (statement of Sen. Wofford) (Life Care Act).

100. WIENER ET AL., *supra* note 4, at 7. According to Wiener, in a time of limited resources, a new program should focus new spending on people receiving LTC at home or who have a chance to return home from the nursing facility. Wiener & Hanley, *supra* note 53, at 79. "In our view, protecting the assets of those who will die in a nursing home deserves a lower priority." WIENER ET AL., *supra* note 4, at 28.

101. WIENER ET AL., *supra* note 4, at 132. Reliance on private insurance is a long-range strategy because its purchasers are typically younger, insurable persons whose need for LTC is not likely to occur for many years down the road. In addition, private insurance will never guarantee universal coverage because some people are simply "uninsurable." *Id.*

102. *Id.* at 132-34 & n.11. A February, 1993 Gallup survey showed strong support for government spending on LTC, even if it meant more taxes. *Id.* at 134 n.11. *See also* Willging Statement, *supra* note 59.

reduce the preference [that] providers tend to give to private-pay patients."[103]

For a variety of reasons, it is improbable that broad-scale federal LTC insurance, like the example above, will come to fruition. First, there is a lack of consensus on what the goals of a LTC system should be.[104] Decision-makers are torn between holding individuals and their families responsible for LTC and the popular support for a social LTC program. They cannot decide, even among initiatives in which public and private insurance coordinate to cover front- and back-end LTC coverage, how to apportion the responsibility. Perhaps this explains why LTC has been treated as the "third rail"[105] or "forgotten step-child"[106] of health care reform. Second, other important issues, such as child welfare and protection for the uninsured, are at the top of the public policy agenda and compete against LTC reform for scarce public resources.[107] Third, as a tradeoff for being more efficient and cost effective, government-based insurance lacks the flexibility to adapt in a rapidly changing world and it eliminates consumer choice in the types of cost-sharing packages that are available.[108] Fourth, the major drawback of a public program is its cost and, by implication, the taxes and other funding mechanisms needed to pay for it.[109] Finally, and perhaps as a result of the aforementioned factors, there is "a growing perception that a regulated private insurance industry can play an important role in addressing the LTC financing problem for middle-income elders."[110]

This author proposes that an equitable balance and a more efficient LTC system calls for the private sector to play the major role. However, for the private sector to become more involved, the public sector must develop mechanisms that will elevate private insurance to a lead role and expand Medicare and Medicaid financing for LTC services. The following section outlines the mechanism, a partnership of front-end private insurance and back-end public catastrophic coverage, by which this LTC reform can be accomplished.

*2. Private-Public Cooperatives.*[111]—Developed primarily on the state level,

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103. WIENER ET AL., *supra* note 4, at 134. However, a leveling in the quality of care has its price: high-quality, high-cost providers would migrate toward "average," thereby reducing their once-higher standards and eliminating consumer choice. *Id.* at 135.

104. Marc A. Cohen et al., *New Perspectives on the Affordability of Long-term Care Insurance and Potential Market Size*, 33 GERONTOLOGIST 105, 105 (1993) [herinafter *New Perspectives on Affordability*].

105. Kapp, *supra* note 54, at 733; *see also supra* note 55.

106. Meiners Testimony, *supra* note 55.

107. *New Perspectives on Affordability*, *supra* note 104, at 105. *See also* WIENER ET AL., *supra* note 4, at 139-40 ("The Greater Importance of Health Care for the Uninsured").

108. WIENER ET AL., *supra* note 4, at 139. *See also* Wiener & Hanley, *supra* note 53, at 79.

109. Wiener & Hanley, *supra* note 53, at 79.

110. *New Perspectives on Affordability*, *supra* note 104, at 105.

111. While some literature broadly categorize these as public-private plans, this author chooses to define them as *private-public* cooperatives or partnerships because, in actuality, the order of payment is no different than the current situation: *private* dollars are exhausted first and then *public* dollars are contributed. The only difference in this new private-public mix is that

private-public cooperatives encourage the individual to purchase LTC insurance to cover the earlier years of LTC needs while public assistance funds catastrophic care—that is, the "longest-term" care—on the back end. Largely through the support and work of the Robert Wood Johnson Foundation (RWJF), a national health care philanthropy that funds The Partnership For Long-Term Care,[112] several states have pursued interests in various forms of private-public cooperatives.[113] Among them, Connecticut, Indiana, New York, and California, the initial participants in the national Partnership for LTC,[114] have succeeded in bringing their plans to fruition. Ten other states have passed enabling legislation;[115] of those ten, Illinois,[116] Iowa,[117] Maryland,[118] and

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insurers pay the private dollars (after the insured pays the premium, of course) instead of the LTC user and her family. Because these private-public cooperative programs are widely known as partnership programs, this Note will hereafter refer to them and to the policies approved by them as "partnership" or "qualified" plans or policies. *See infra* notes 163-64 regarding "qualified."

112. The national program office is located at the University of Maryland, Center on Aging, HHP Building, Room 1240, College Park, MD, 20742-2611, (301) 405-2544.

113. According to the national office of the Partnership for Long-Term Care, nearly 20 states had initiated enabling legislation of some form of partnership plans before mid-1993. McKay Interview, *supra* note 91. The effect of OBRA-93's estate recovery requirement, which nullifies much of the asset protection awarded these plans, stalled most states' interests in these programs (*see infra* notes 125-130 and accompanying text); however, several states continued to enact and propose enabling legislation. *See, e.g.*, Kansas H.R. 2324, 75th Leg., 1st Sess. (1993) (proposal by Representatives Wells and Lane). Maryland and Illinois, despite the restriction, went forward with their programs, approved state amendment plans and promulgated regulations for program and policy development. McKay Interview, *supra* note 91.

114. PARTNERSHIP FOR LONG-TERM CARE, PROGRAM DESCRIPTION (University of Maryland, Center on Aging ed. 1993). Iowa joined the list in 1993 with a program designed like the ILTCP. McKay Interview, *supra* note 91; WIENER ET AL., *supra* note 4, at 88-89. Massachusetts, New Jersey, Oregon, and Wisconsin were initially involved in implementing similar RWJF programs. MARK R. MEINERS, ADMINISTRATION ON AGING RESEARCH, SUPPORT OF STATE LONG-TERM CARE INS. PARTNERSHIP DEV. PROGRAMS vii (1991). However, these states were not able to fully implement their programs when they were stifled by Clinton's and other public reform proposals and by OBRA-93. McKay Interview, *supra* note 91.

115. Enabling legislation has passed in Colorado, Illinois, Iowa, Maryland, Massachusetts, Missouri, North Dakota, Ohio, Rhode Island, and Washington. *Replication Activity*, PARTNERSHIP UPDATE (Partnership for Long-Term Care, University of Maryland, Center on Aging, College Park, Md.), July 1995, at 3 [hereinafter PARTNERSHIP UPDATE, July 1995]. Six other states have either passed study legislation or currently have enabling legislation pending: Kansas, Michigan, Minnesota, Pennsylvania, Tennessee, Virginia. *Id.*

116. ILL. ANN. STAT. ch. 320, paras. 35/1 to /60 (Smith-Hurd 1993 & Supp. 1995). Illinois has one insurer which has filed its product for certification. McKay Interview, *supra* note 91.

117. IOWA CODE ANN. §§ 249G.1-249G.4 (West 1994) (Long-Term Care Asset Preservation Program); IOWA CODE ANN. §§ 514G.1-514G.10 (West 1988 & Supp. 1995) (Long-Term Care Insurance).

118. MD. CODE ANN., HEALTH-GEN. §§ 15-401 to -407 (1994).

Massachusetts,[119] have also approved state amendment plans and submitted proposed rules and regulations for the implementation of their programs.[120]

The advantages to private-public cooperatives are that they: 1) offer high quality LTC insurance coverage which is subject to stricter standards in a way that is more affordable than before; 2) help contain state medical assistance expenditures; 3) prevent personal impoverishment; and 4) eliminate incentives for asset transfer.[121] These advantages are discussed in greater detail below in the ILTCP example.

The mechanism primarily used in these programs is an amended state plan that allows the state to disregard the assets or resources of an individual on the condition of purchasing an approved LTC insurance policy. Most plans follow a "dollar-for-dollar" model,[122] while New York follows a "total asset protection" model[123] and Massachusetts limits its asset disregard to the home.[124]

In whatever form, it was this device—access to a means-tested welfare program to protect assets of middle- and upper-middle-income elderly, allowing them to leave inheritances with Medicaid dollars—that was the target of Congress's hostility during the thrust for public reform. In a last-ditch effort to quash the growing interest in the partnership programs and the accompanying expansion of Medicaid eligibility, Representative Henry A. Waxman inserted an

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119. MASS. GEN. L. ANN. ch. 118E, § 25 (West 1994).

120. McKay Interview, *supra* note 91.

121. IND. CODE § 12-10-9-5 (1993 & Supp. 1995); IOWA CODE ANN. § 249G.1 (West 1994).

122. CONN. GEN. STAT. ANN. § 17-12q (1992 & Supp. 1995) (to be codified at § 17b-252); IND. CODE §§ 12-10-9-1 to -11 (1993 & Supp. 1995); IND. CODE §§ 27-8-12-7 to -7.1 (1993 & Supp. 1995); CAL. WELF. & INST. CODE §§ 22000-22013 (West 1991 & Supp. 1995); IOWA CODE ANN. §§ 249G.1-249G.4 (West 1994); IOWA CODE ANN. §§ 514G.1-514G.10 (West 1988 & Supp. 1995).

123. The New York State (NYS) Partnership for LTC allows a person to protect all remaining assets once that person has purchased a certified partnership policy. The certified policy must cover a minimum of either three years of nursing home care or six years of HHC or a combination of the two, with a minimum daily benefit of $105 for 1994 and $110 for 1995. N.Y. COMP. CODES R. & REGS. tit. 11, § 39 (1992). *See* NEW YORK STATE PARTNERSHIP FOR LONG TERM CARE, QUARTERLY UPDATE (1995) [hereinafter NEW YORK QUARTERLY UPDATE, FIRST QUARTER 1995]. "New York's target population is different" from the other states. McKay Interview, *supra* note 91. Because it has a population with one of the highest disposable income levels, New York is interested in reaching those people who can afford to buy insurance but until now have resorted to transferring assets in order to become Medicaid eligible. *Id. See also* WIENER ET AL., *supra* note 4, at 88-89 & n.f.

124. Prior to its partnership program, Massachusetts was one of several states which, under 42 U.S.C. § 1396p(a) (1988 & Supp. V 1993) (Medicaid lien), was permitted to put a lien on the LTC user's home against the amount of public dollars spent for LTC services. McKay Interview, *supra* note 91. The new program disregards the home, and only the home, and forgoes the Medicaid lien when the individual purchases a qualified LTC policy covering a minimum daily benefit. MASS. GEN. L. ANN. ch. 118E, § 25 (West 1994).

OBRA-93 provision[125] that specifically reneged the asset disregard feature conferred by private-public cooperatives. Prior to OBRA-93, states were permitted, but not required, to use estate recovery programs to recoup Medicaid benefits that paid for LTC services.[126] Estate recovery is now mandatory in all states[127] for certain situations, and specifically for individuals who received Medicaid by having their assets and resources disregarded in connection with the receipt of benefits under a LTC insurance policy;[128] in other words, the beneficiaries of partnership policies. In the case of partnership beneficiaries, the state must seek estate recovery for Medicaid benefits paid for nursing facility and "other [LTC] services,"[129] effectively reversing, post-mortem, any expansion of Medicaid benefits derived during the partnership beneficiary's lifetime. Grandfathered from this restriction are partnership participants in California, Connecticut, Indiana, Iowa, Massachusetts, and New York whose state amendment plans were approved prior to OBRA-93's May 14, 1993 deadline.[130]

Since the demise of the Health Security Act and other public LTC insurance proposals, there is a revived interest in the state private-public cooperatives and a partnership program on a national level.[131] The Secure Choice Long-Term Care Bill[132] called for a premium subsidy for persons whose income is between the federal poverty level (FPL) and 300 percent of the FPL, and would provide this

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125. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612(a), 107 Stat. 312, 627 (amending 42 U.S.C. § 1396p(b)(1) (1988 & Supp. V 1993)).

126. 42 U.S.C. § 1396p(b)(1) (1988 & Supp. V 1993). Recovery was limited, among other ways, in that it could only recoup nursing home benefits or benefits paid to persons who were 65 or older when they received Medicaid, and could only occur after the death of a surviving spouse so long as there were no surviving dependent children. *Id. See also* Nemore et al., *supra* note 52, at 1205.

127. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612(a), 107 Stat. 312, 627 (1993).

128. *Id.* In addition, states are required to recover from: 1) individuals in nursing homes or other facilities who pay a share of the cost as a condition of receiving Medicaid and who cannot be reasonably expected, ever, to be discharged and returned home, and 2) individuals who were age 55 and over when they received Medicaid payments for nursing home care, HHC, and community-based services and related hospital and prescription drug services. *Id.* These provisions apply to Medicaid payments made on or after October 1, 1993. *Id.* § 13612(d)(1)(A), 107 Stat. at 628. *See also* Nemore et al., *supra* note 52, at 1205.

129. Nemore et al., *supra* note 52, at 1205. Because the reference to HHC and community-based care is not limited to "waiver" services, states might have to try to recover for state-provided services that go beyond federal Medicaid costs. *Id. See infra* notes 138-39 and accompanying text regarding state Medicaid waivers.

130. Nemore et al., *supra* note 52, at 1205; McKay Interview, *supra* note 91 (Iowa's program director got wind of Representative Waxman's draft and pushed its state plan amendment through in two weeks to meet the deadline).

131. *See* Willging Statement, *supra* note 59 (praising the Life Care Act's proposal for federal participation in such a plan).

132. S. 1600, *supra* note 96.

target group "enhanced asset protection above that permitted under [current Medicaid rules]."[133] The Life Care Act[134] would allow individuals to purchase $30,000, $60,000, or $90,000 in LTC benefits from a qualified policy with an equal level of asset protection. According to its co-sponsor, Senator Wofford, the Life Care Act is a better solution than universal public insurance: "Even the Health Security Act, which I have cosponsored, does not go far enough. . . . [It] does not fully address the cruel way we now pay for long-term nursing home care, which force[s] [individuals] to spend themselves onto welfare."[135] An explanation of the design, development, and implementation of private-public cooperatives through the ILTCP example will provide a framework for analysis for either a national partnership or for coordination of similar partnership systems in all states with some federal intervention.

## III. THE INDIANA LONG TERM CARE PROGRAM (ILTCP)[136]

### *A. Legislative Development*

The enabling legislation for ILTCP,[137] the first of its kind in the nation in 1987, directed the Indiana Department of Public Welfare to apply to the Department of Health and Human Services (DHHS) Health Care Financing Administration (HCFA) for a Medicaid waiver.[138] The waiver[139] allows the state to provide certain community and in-home services not covered in the state Medicaid plan in order to encourage the use of these less costly alternatives and to avoid or delay institutionalization of patients whenever possible. In December 1991, HCFA approved Indiana's state plan amendment[140] authorizing an asset disregard[141] under section 1902(r)(2) of the Social Security Act.[142] The

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133. 139 CONG. REC. S14,629, S14,630 (daily ed. Oct. 28, 1993) (statement of Senator Packwood).

134. S. 1833, *supra* note 99.

135. 140 CONG. REC. S1318, S1319 (daily ed. Feb. 10, 1994) (statement of Senator Wofford).

136. IND. ADMIN. CODE tit. 760, r. 2-20-1 to -43 (Supp. 1995) (authorized by IND. CODE §§ 12-10-9-1 to -11 (1993 & Supp. 1995); IND. CODE §§ 27-8-12-7 to -7.1 (1993 & Supp. 1995)).

137. Act of May 6, 1987, No. 42, § 11, 1987 Ind. Acts 1242, 1252-46 (codified as amended at IND. CODE. § 12-10-9-5 (Supp. 1995)).

138. 42 U.S.C. § 1396n(b)-(d) (1988 & Supp. V 1993). The Secretary is authorized to waive certain requirements to promote cost effectiveness and efficiency in the delivery of health care. *Id.*

139. IND. ADMIN. CODE tit. 760, r. 2-20-24 (Supp. 1995). Indiana's Medicaid waiver services include case management, homemaker services, respite care, attendant care, adult day care, and "other services which . . . are essential to prevent institutionalization." *Id.*

140. INDIANA LONG TERM CARE PROGRAM, FAMILY & SOCIAL SERV. ADMIN., INDIANA LONG TERM CARE PROGRAM: INSURER PARTICIPATION REQUIREMENTS A-3 to A-4 (1993) [hereinafter ILTCP INSURER PARTICIPATION REQUIREMENTS].

141. *See infra* notes 162-68 and accompanying text explaining asset disregard.

142. 42 U.S.C. § 1396a(r)(2) (1988 & Supp. V 1993).

amendment allows individuals to receive Medicaid assistance by having their assets disregarded from spend-down requirements in connection with the purchase of and the benefits received from an approved LTC insurance policy. The ILTCP is administered by the Indiana Family and Social Services Administration and its implementation is shared with the Department of Insurance. Indiana's program was introduced on May 18, 1993, with qualified policies offered from eight different insurers.[143]

The ILTCP was developed with the following objectives: 1) to stimulate individuals to insure for their LTC needs; 2) to provide a mechanism for qualifying for Medicaid LTC assistance without first being required to exhaust all their resources; 3) to provide high quality, accessible and affordable LTC insurance; 4) to improve public understanding of LTC financing and provide counseling services to individuals in planning for their LTC needs; and 5) to alleviate the financial burden on the state's medical assistance budget by encouraging private initiatives.[144] Toward the goal of high-quality insurance coverage, the program holds insurers to stricter standards than the NAIC Model Act[145] by imposing heavy reporting requirements,[146] marketing and agent licensing standards,[147] and the following minimum benefit standards:

(1) Minimum daily nursing home benefit of seventy-five percent of the state's average daily private-pay rate, which is re-calculated every calendar year.[148]

(2) Maximum policy benefits must be stated in lump sum dollar terms, not in days or years of care,[149] and must offer a minimum plan designed to cover one year of nursing home costs.[150]

(3) Mandatory inflation protection, which increases both the daily benefit and the maximum policy benefit annually without additional

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143. INDIANA LONG TERM CARE PROGRAM, FAMILY & SOCIAL SERVS. ADMIN., INDIANA LONG TERM PROGRAM: LONG TERM CARE INS. UNIFORM DATA SET REPORTING 2 (1993) [hereinafter ILTCP UNIFORM DATA, THIRD QUARTER 1993]. There are currently ten approved insurers. PARTNERS (Indiana Long Term Care Program, Family & Social Servs. Admin., Indianapolis, Ind.), Winter 1995, at 1 (right-hand column).

144. IND. CODE § 12-10-9-5 (Supp. 1995).

145. *See* NAIC MODEL ACT, *supra* note 43.

146. IND. ADMIN. CODE tit. 760, r. 2-20-37 to -40 (Supp. 1995).

147. *Id.* r. 2-20-34.

148. *Id.* r. 2-20-36.1(3). *See also id.* r. 2-20-36.2, -36.3 (regarding nursing-home-only policies and qualified riders, respectively).

149. *Id.* r. 2-20-34.

150. *Id.* r. 2-20-36.1(1)-(2). At a minimum, policies must contain and offer a "maximum benefit amount option equivalent to [365] times the minimum daily nursing facility benefit." *Id.* r. 2-20-35(2), -35(3).

proof of insurability.[151]

(4) ILTCP now allows participants to select approved policies covering only nursing home care.[152] If HHC coverage is purchased—either initially with nursing home coverage (integrated policy)[153] or added later as a rider—the policy must pay daily benefits for HHC, respite and community care benefits of at least fifty percent of, but not more than, the purchased nursing home maximum daily benefit.[154]

(5) Specific "benefit triggers" which require policy benefits to be paid[155] upon a showing that the individual has either:
   a) a deficiency in two or more of the following uniform Activities of Daily Living (ADLs): eating, transferring (or mobility), dressing, bathing, and toileting;[156] or
   b) a cognitive impairment, including Alzheimer's disease and similar forms of senility or irreversible dementia;[157] or
   c) a complex, unstable medical condition which requires round-the-clock assistance of professional nursing observation or intervention more than once a day.[158]

(6) Protection against lapse by requiring the insurer to a) notify an authorized designee, usually a family member of the insured, that the policy is about to lapse and b) provide a minimum ninety-day guaranteed reinstatement period for a policyholder who, due to a cognitive impairment, has forgotten to pay her premium.[159]

(7) Mandatory offer to reduce coverage to a lower premium if the policy becomes too expensive to maintain at its current level.[160]

Moreover, toward the goal of educating the public on LTC alternatives and financing arrangements, the Department of Insurance created the Senior Health

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151. *Id.* r. 2-20-35(2), -35(3).

152. IND. CODE § 12-10-9-7.5(b) (Supp. 1995); PARTNERSHIP UPDATE, Dec. 1994, *supra* note 31, at 3.

153. IND. ADMIN. CODE tit. 760, r. 2-20-21.1 (Supp. 1995).

154. *Id.* r. 2-20-36.1(3)(B).

155. *Id.* r. 2-20-21 ("insured event" defined).

156. *Id.* r. 2-20-4.

157. *Id.* r. 2-20-14.

158. *Id.* r. 2-20-15.

159. *Id.* r. 2-20-36(6), -36(7).

160. *Id.* r. 2-20-36(5). This reduced benefit amount offer cannot dip below the minimum benefit required for qualification and the insurer is only required to allow this offer to be exercised once. *Id.* r. 2-20-36(5), -36(6).

Insurance Information Program (SHIIP).[161] The SHIIP enlists trained senior volunteers to counsel interested persons concerning questions about ILTCP as well as Medicare and Medicaid rights and filing procedures.

### *B. Design of the Program*

Indiana's program is a true private-public cooperative in which senior citizens are encouraged to purchase private insurance to cover front-end costs while the state's medical assistance program, primarily Medicaid, picks up the back-end, catastrophic costs. Like its counterparts in Connecticut, California, and Iowa,[162] ILTCP works as follows: for every dollar of LTC benefits paid by a qualified LTC policy,[163] a dollar of the qualified insured's[164] assets[165] is protected from Medicaid spend down rules.[166] The individual's income, however, is not protected from Medicaid and must still be contributed to LTC expenditures. In the earlier example, Grandma would purchase a qualified LTC policy in the amount of the total assets she wishes to protect, presumably the full $60,000.[167] When her need for LTC arises, the insurance policy will pay first until all policy benefits are exhausted. Then Grandma will apply for Medicaid and will receive assistance for LTC costs to the extent they exceed her monthly income.

Grandma keeps control of her assets and does not have to spend them down or transfer them to become eligible for Medicaid. The insurance dollars substitute

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161. ILTCP INSURER PARTICIPATION REQUIREMENTS, *supra* note 140, at A-4. The free counseling services are accessible through a network of statewide offices and a toll-free number, 1 (800) 452-4800.

162. *See supra* notes 114 and 122. *See also supra* notes 123-24 and accompanying text discussing how New York's and Massachusetts' programs differ.

163. Only those policies which meet the strict coverage and reporting requirements of IND. CODE §§ 27-8-12-7 to -7.1 (1993 & Supp. 1995) and IND. ADMIN. CODE tit. 760, r. 2-20-37 to -40 (Supp. 1995) for the purpose of participating in ILTCP are eligible for asset disregard and asset protection. IND. ADMIN. CODE tit. 760, r. 2-20-30 (Supp. 1995).

164. A "qualified insured" is a "beneficiary of a qualified long term care policy" or is otherwise enrolled in a health maintenance organization (HMO) that covers LTC services. IND. ADMIN. CODE tit. 760, r. 2-20-29 (Supp. 1995); IND. CODE § 12-10-9-7 (Supp. 1995).

165. The term "assets," as opposed to "resources," limits the protection to particular tangible and intangible assets. "Resources" encompasses income and rights to income which ILTCP does not protect.

166. Asset disregard operates to increase the Medicaid eligibility threshold: "'asset disregard' means a one dollar ($1) increase in the amount of assets [a qualified insured] may retain under [Indiana Code section] 12-15-3 for each one dollar of benefit paid out [by the qualified policy] for long term care services." IND. CODE § 12-10-9-8(a) (Supp. 1995).

167. There is no limit to the amount of assets she can protect. She could, in order to reduce premiums or for any other reason, choose to insure an amount less than her asset total, say $40,000. In that case, after the policy benefits are paid on eligible services, she must deplete her excess assets ($20,000 in this example) down to the protected level of $40,000 before Medicaid will pay for her LTC needs.

for her own assets; therefore, although Grandma becomes eligible for Medicaid, she does so no sooner by "spending down" insurance dollars for LTC than by spending her own dollars. Further, because she does not become dependent on Medicaid any sooner with partnership insurance than with the current system, the state's medical expenditures, all else being equal,[168] do not increase. Because Grandma still has assets producing income, she can still contribute that income to her LTC costs and possibly reduce the dollars that Medicaid would otherwise have paid. Moreover, the state pays only for the back-end or catastrophic coverage and, because the majority of individuals use LTC for less than twenty-four months, the likelihood for long-term Medicaid dependence may be reduced.

### *C. How ILTCP Measures Up*

Several considerations for national LTC reform were presented in Part II A that provide a yardstick to measure ILTCP's solution. This section revisits those factors and offers additional considerations specific to the design of the private-public cooperatives which either support or hinder the proposition that ILTCP is a model for national LTC reform.

*1. Public Awareness.*—Whenever a new state program is introduced it raises eyebrows, either from skepticism or from genuine interest. The ILTCP, launched amidst the national health care reform thrust, has raised, through media coverage, literature and television advertisements, public awareness of the potential for, costs of, and alternative options to LTC.[169] To further disseminate information and educate the public, ILTCP put mechanisms in place like SHIIP whereby interested persons may receive one-on-one counseling from disinterested state volunteers regarding ILTCP and LTC insurance in general, and advice on Medicare and Medicaid rights and filing procedures. Likewise, program marketing efforts and SHIIP services have elevated awareness and discussion of alternative delivery systems, such as HHC and community care, that are available and may already be covered by Medicare.[170] After an individual purchases a qualified insurance plan, and once the need for LTC develops, mandatory case management services[171] continue to direct the insured to various service and payment alternatives. The ILTCP goes a long way toward producing more knowledgeable consumers who, in turn, make better decisions about their LTC planning.

State and national decision-makers, providers and private insurers also benefit from the improved quality of information resulting from insurer reporting

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168. *See infra* notes 198-201 and accompanying text explaining how inflation and increased use resulting from moral hazard affect public expenditures with the private-public cooperative system.

169. In January 1995, ILTCP spent $40,000 on television spots to "mak[e] the public aware of the program and get[] them to make the first step of calling [SHIIP's toll-free number] for more information." Memorandum from Jim Leich, Director, Indiana Long Term Care Program, to Agent Partners (January 5, 1995) (on file with the author).

170. *See* Branch et al., *supra* note 38.

171. IND. ADMIN. CODE tit. 760, r. 2-20-9 to -10 (Supp. 1995).

requirements. Participating insurers must maintain and submit quarterly data on individuals who purchased qualified plans,[172] changed or dropped their coverage,[173] were denied coverage, and why they were denied.[174] Additional data is submitted as to age, sex, marital status of ILTCP buyers, and whether they purchased individual or group policies. Furthermore, partnership programs report the types of benefits (nursing home care or HHC) insurance dollars pay for[175] and the insured's progress in qualifying for asset protection.[176] The data from all of the state partnership plans are given to the national office[177] and will be used for the benefit of program directors, interested states, and the private insurance industry.

Achieving quality information on non-partnership insureds, however, is difficult because insurance companies are reluctant to publish their market share information and to incur the additional costs involved in collecting the data.[178] The Medicare Current Beneficiary Survey (MCBS) is a continuous survey of a representative sample of the Medicare population that grew out of the need to provide valid estimates of different types of health care spending.[179] Although its information draws from a broader sample—Medicare enrollees who may or may not be receiving LTC services—MCBS is a multi-purpose system[180] and is not focused on identifying the actual types of LTC needed or used. Thus, improved information-gathering mechanisms on state and national levels are still needed in order to obtain the full LTC picture on the larger sample of American seniors.

2. *Defining the Scope of LTC.*—Even with the NAIC's standards, confusing variations exist in today's ordinary LTC policies. A policy's "insured event," which triggers payment of benefits, may require deficiencies in one, two or three out of a list of five or six ADLs or may be complicated further by including instrumental ADLs (IADLs) in the mix.[181] Such ADL or IADL deficiencies may or may not need a physician's certification before benefits are paid. Options for inflation protection range from simple to compound annual increases that continue for either a limited period, such as fifteen years or to age eighty, or for life. Policies also differ on the extent and types of HHC and community-based care that are included. While most policies do not reimburse for home care provided by family members, a diligent LTC shopper will find a few policies that will pay for

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172. *Id.* r. 2-20-37(1).

173. *Id.* r. 2-20-37(2), -37(3).

174. *Id.* r. 2-20-37(4).

175. *Id.* r. 2-20-37(5) to -37(7).

176. *Id.* r. 2-20-39.

177. PARTNERSHIP UPDATE, Dec. 1994, *supra* note 31, at 4.

178. McKay Interview, *supra* note 91.

179. Gerald S. Adler, *A Profile of the Medicare Current Beneficiary Survey*, 15 HEALTH CARE FINANCING 153, 153 (1994).

180. *Id.*

181. "'Instrumental activities of daily living,' or IADLs, capture a more complex range of activities necessary for independent living in the community, including handling personal finances, preparing meals, shopping, traveling, doing housework, using the telephone, and taking medications." WIENER ET AL., *supra* note 4, at 164.

such costs. The myriad of options makes it difficult for most LTC insurance prospects to compare products and to make a confident decision on LTC protection.

The ILTCP and its counterparts eliminate the confusion by setting specific, uniform ADL definitions and defined benefit triggers for all qualified policies.[182] Home health care and community care coverage is no longer required on each policy; however, when these coverages are purchased, the policy must pay at least half the daily nursing home benefit that was purchased.[183] Inflation protection is mandatory for ILTCP policies either through automatic annual increases in the daily benefit (and the unused benefits) or by tying the policy benefit to at least seventy-five percent of the State's average daily private-pay rate.[184] Without stifling the creative options and competitive forces needed in the marketplace, ILTCP reduces the noise and confusion of policy provisions thereby enabling its insured participants to make educated choices.

*3. Cost Containment.*—Issues of cost containment include costs to the consumer in addition to concerns for controlling public program expenditures.

*a. Consumer affordability.*—Opponents contend that the affordability of LTC insurance is prohibitive for most seniors[185] and ILTCP only benefits the persons who could afford the insurance in the first place. Thus, so the argument goes, the partnership programs do not improve on today's situation; indeed, they only benefit those who could buy insurance anyway by allowing them to use public dollars to the detriment of public programs designed for the needy. These arguments fail to acknowledge that

> [t]he problem with the current system is that an individual who buys a policy covering, for example, two years of [LTC] but who ends up needing care for five years can still lose all his or her assets. These Medicaid initiatives thus make it possible to obtain lifetime asset protection without having to buy an insurance policy that pays lifetime benefits.[186]

Without the ILTCP option, to absolutely protect her assets from spend down Grandma would have to purchase a lifetime coverage policy, costing approximately $3,686 per year.[187] Under ILTCP she receives the same "lifetime"

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182. IND. ADMIN. CODE tit. 760, r. 2-20-4, -14, -15, -21 (Supp. 1995). *See supra* notes 155-58 and accompanying text.

183. IND. ADMIN. CODE tit. 760, r. 2-20-36.1(3)(B)-(C) (Supp. 1995). *See supra* notes 152-54 and accompanying text.

184. IND. ADMIN. CODE tit. 760, r. 2-20-35(2), -35(3) (Supp. 1995). *See supra* note 148 and accompanying text.

185. Some studies indicate LTC insurance is within the reach of only 20% of today's elderly. Cohen et al., *supra* note 42, at 408. *See also How Much Public?*, *supra* note 81, at 427.

186. WIENER ET AL., *supra* note 4, at 89.

187. Rates for Bankers United Life Assurance Company's GoldenCare Plus policy, based on $80 per day nursing home benefit, with lifetime nursing home and HHC benefits ($40 per day), inflation protection, and a 20-day deductible period.

asset protection by purchasing $60,000 in LTC benefits for an annual premium of $2,662.[188] "Smaller" policies[189] mean smaller premiums for ILTCP's target market and, consequently, a greater inducement to seek out private insurance.

Affordable policies provide additional advantages for this target group. First, the alternative to Medicaid eligibility—asset transfer to "look poor"—is less attractive. "[A]necdotal evidence suggests that at least some older people divest their assets to become Medicaid eligible under the current financing system."[190] The asset protection of ILTCP would obviate this need, reducing the total spend down by expanding the eligibility threshold.[191] Second, reduced premiums for lifetime asset protection will induce low-risk consumers to buy,[192] which eventually may reduce overall premiums by normalizing the risk pool.

Another significant rebuttal to the unaffordability argument is that demand for LTC cannot be measured wholly by the consumer's "ability to pay." "[A]s with other products, people base their purchase of [LTC] insurance on its perceived value relative to cost. If [LTC] insurance is perceived as a good buy, then more people will purchase policies. . . . [B]eing able to afford something and deciding to purchase it are two distinctly different concepts."[193] At a forty-three percent chance of entering a nursing home[194] and, consequently, the great potential for spend down, the costs are high. The perceived value of LTC protection relative to its cost will be very high for most people.

The end result of asset depletion has been tested by computer simulation.[195] Three possible financing structures were used: 1) no private insurance but the existing Medicaid system remains in place (public model); 2) private LTC insurance coverage for everyone and the existing Medicaid system remains in place (private model); and 3) a private-public cooperative system like ILTCP.[196] The ILTCP analogue had the intended effect of reducing asset depletion; it showed, not surprisingly, a substantial improvement over the public model and beat the private model by more than three to one.[197] If reducing personal impoverishment is a goal of a reformed LTC system, and it should be, ILTCP and its counterparts are the best solution.

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188. *Id.* ILTCP GoldenCare Plus rates based on $80 per day nursing home care, $40 per day HHC, inflation protection, 20-day deductible period, and $60,000 worth of benefits.

189. Recall that under ILTCP benefits are measured in lump sum dollar amounts rather than months or years of coverage, (IND. ADMIN. CODE tit. 760, r. 2-20-35(1) (Supp. 1995)) so "smaller" rather than shorter coverage is the appropriate term.

190. Arling Simulation, *supra* 82, at 716.

191. *Id.*

192. Recall that adverse selection in private insurance means persons who know they are high-risk already have an incentive to buy. *See supra* notes 65, 67-70 and accompanying text.

193. Cohen et al., *supra* note 42, at 408.

194. Kemper & Murtaugh, *supra* note 2, at 597-98.

195. Arling Simulation, *supra* note 82.

196. *Id.*

197. Personal assets used for LTC costs under the public model were $48.7 million, the private model, $36.0 million, and the ILTCP analogue model, $10.7 million. *Id.* at 709.

*b. Controlling public expenditures.*—The effects of any private insurance proposal on the public purse will not be known for a decade or two.[198] In theory, under ILTCP Medicaid expenditures will not increase because individuals will become eligible no sooner than under the current financing system. This theory was tested and proved accurate when costs and use of LTC services remain level.[199] The more likely scenario is that LTC costs will increase in the future. Moreover, use will increase: "a new financing plan may bring about changes in LTC use, either through adverse selection or insurance induced demand [moral hazard]."[200] When LTC inflation and increased use of LTC services are factored into the simulation, Medicaid absorbs most of the cost increases under all three financing arrangements.[201] However, the ILTCP model still shows less increase in Medicaid expenditures than the public model.[202]

Moral hazard occurs with either privately- or publicly-insured LTC programs. As originally designed, ILTCP would have tempered the moral hazard effect, particularly the "Cadillac care" effect, because asset protection only applied to those payments that covered "Medicaid-eligible [LTC] services."[203] Hence, although Grandma's policy would pay $60,000 in benefits, she might have had to spend down her own assets to a lower threshold (less than $60,000) if the policy paid for non-Medicaid-eligible services. ILTCP no longer conditions asset protection on Medicaid eligible services; rather, a qualified insured shields a dollar of her own assets for each dollar of policy benefits paid for any long term care services.[204] Although this control against moral hazard has been removed, other safeguards remain. For instance, case management services are required with all HHC and community care services to assess, coordinate and monitor such services.[205] Mandatory case management helps assure appropriate, cost-effective LTC services are utilized.

Another advantage of ILTCP which offsets the impact of increased LTC use on public expenditures is that participants are allowed to keep their assets. Grandma earns interest income on her $60,000 of assets. Partnership plans only protect assets, not income, from Medicaid spend down.[206] The ILTCP system allows her to retain those assets and, consequently, a higher income from which

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198. WIENER ET AL., *supra* note 4, at 90. Because most policies will be purchased by younger, more insurable seniors, their use of policy benefits and then Medicaid dollars is delayed for many years. *Id.*

199. Arling Simulation, *supra* note 82, at 709. Medicaid funding under the ILTCP analogue totaled $67.1 million compared to $71.5 million for the public model. The entirely private model, for obvious reasons, had the lowest Medicaid funding at $41.8 million. *Id.*

200. *Id.* at 715.

201. *Id.* at 712-13.

202. *Id.* ($117 million compared to $121 million for the public model).

203. IND. CODE. § 12-10-9-8(a) (1993).

204. *Id.* § 12-10-9-8(a) (Supp. 1995). *See also* IND. ADMIN. CODE tit. 760, r. 2-20-18.1 (Supp. 1995) ("Eligible long term care services" defined).

205. IND. ADMIN. CODE tit. 760, r. 2-20-36.1 to -36.3 (Supp. 1995).

206. *See supra* notes 163-66 and accompanying text.

she must contribute to her own LTC costs, relieving the state Medicaid budget of at least some of the burden. The state (and the federal government), therefore, retains a taxpayer who can continue to contribute to her own LTC cause. This feature, largely overlooked in the public cost control debate, improves on the current structure in which an impoverished individual has no assets, and thus no income from assets to help pay for LTC services. Because ILTCP's target market is individuals with assets between $50,000 and $300,000, interest income earned on those assets and the income taxes paid at the state and federal level are significant factors offsetting the potential increases in public spending that cannot be overlooked.

*4. Quality of Care Received.*—Most health care providers are business organizations; thus, they undertake their endeavors with the hope of doing so profitably or, at least, not at a loss. Nursing facilities and HHC agencies are not required to accept Medicaid patients, but most do if they have available beds.[207] Given two patient populations, one paying full costs of care and the other covering only about sixty to seventy percent of costs, astute business managers will allocate a greater portion of their scarce resources (primarily human resources in this field) to the hand that feeds them and fewer resources to the hand that seeks handouts. It is precisely this scenario which explains why Medicaid patients are often relegated to "second-class nursing home residents."[208] A primary goal of ILTCP is to eliminate this dual-treatment practice.

Quality of care is best when private dollars pay—when patients are able to pay, whether with their own assets or with insurance dollars, the full costs of their care. When a LTC financing system works to improve the private-/public-pay ratio, everyone benefits: the private-pay patient receives more attentive care; the provider can cover costs of more or higher-skilled staff; and the Medicaid patient indirectly benefits from the improved quality of care.

Opponents of ILTCP argue that it does nothing to change the private-/public-pay ratio because its participants eventually turn to Medicaid and because the same percentage of people will start out on Medicaid as would without the program. This attack does little to offer a solution; rather it drains alternative public proposals of their strength. It also ignores the corollary benefits of marketing the partnership plans: the simultaneous increase in non-partnership plan sales.[209] "An analysis of sales in Indiana indicates that total sales of *all* [LTC] policies by participating insurers increased by 27% during the six months following the

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207. Fortunately, Indiana's vacancy rate is higher than many states. "Indiana ranked first in the country in nursing home beds per capita in 1992." *Did You Know?*, PARTNERS (Indiana Long Term Care Program, Family & Social Servs. Admin., Indianapolis, Ind.), Autumn 1994, at 2 [hereinafter PARTNERS, Autumn 1994]. In some states with lower vacancy, finding a "Medicaid bed" is difficult and is another reason persons who need care just cannot get it.

208. WOLFE, *supra* note 1, at 83-84. *See also* WIENER ET AL., *supra* note 4, at 136.

209. The impression at the national Partnership for LTC office, although hard data are difficult to obtain from non-partnership insurers, is that LTC sales in partnership states are up for both partnership and non-partnership policies. McKay Interview, *supra* note 91.

initiation of the program."[210] Therefore, at least some of the qualified policy plans are not displacing regular LTC insurance sales.[211] Indeed, the increased awareness and improved product quality that accompany the partnership programs have, no doubt, induced demand for all LTC policies. Another factor which may explain the overall increase in LTC insurance sales is that, out of the full sample of all persons who investigate the program, a significant number discover that eventual Medicaid dependence is not desirable and that lifetime coverage under a regular policy is a better solution. Those persons who purchase non-qualified LTC insurance do even more to improve the public expenditure outlook: private-pay patients are in the system longer because, after insurance benefits are paid out, they must use personal assets for LTC before Medicaid steps in.

Not all ILTCP participants are bound for Medicaid as the program's opponents claim. A significant portion of ILTCP purchasers have chosen lifetime coverage.[212] In Indiana, forty-one ILTCP buyers purchased lifetime coverage, compared with eight in Connecticut and four in New York.[213] Most remarkable is the New York figure because participants automatically receive lifetime "total asset protection" by purchasing just three years of nursing home care and six years of HHC benefits.[214] The purchase of lifetime coverage by the New York residents[215] indicates that expanded eligibility for Medicaid is not the only major feature that drives sales. Many buyers prefer a high quality LTC insurance

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210. PARTNERSHIP UPDATE, Dec. 1994, *supra* note 31, at 3 (emphasis added).

211. Few people are replacing their current policies to purchase the asset protection plans. For the period ending September 30, 1993, 71% of ILTCP sales were by first-time purchasers with only 29% replacements, which is comparable with Connecticut, 74% versus 26%, and New York, 76% first-time versus 24% replacement purchases. *See* ILTCP UNIFORM DATA, THIRD QUARTER 1993, *supra* note 143, at 3; Memorandum from the Connecticut Partnership for Long-Term Care to the National Partnership for Long Term Care 3 (Dec. 15, 1993) (on file with author) [hereinafter Connecticut Quarterly Figures, Third Quarter 1993]; NEW YORK STATE PARTNERSHIP FOR LONG TERM CARE, QUARTERLY UPDATE 3 (1993) [hereinafter NEW YORK QUARTERLY UPDATE, THIRD QUARTER 1993].

212. ILTCP UNIFORM DATA, THIRD QUARTER 1993, *supra* note 143, at 3. The 41 sales in Indiana accounted for 18% of all ILTCP sales in the first two quarters of the program. By the first quarter of 1995, 14% of the cumulative total of ILTCP purchasers chose lifetime coverage. INDIANA LONG TERM CARE PROGRAM, FAMILY & SOCIAL SERVS. ADMIN., INDIANA LONG TERM PROGRAM: LONG TERM CARE INS. UNIFORM DATA SET REPORTING STATISTICS 5 (1995) [herinafter ILTCP UNIFORM DATA, FIRST QUARTER 1995].

213. ILTCP UNIFORM DATA, THIRD QUARTER 1993, *supra* note 143, at 3; Connecticut Quarterly Figures, Third Quarter 1993, *supra* note 211, at 2; NEW YORK QUARTERLY UPDATE, THIRD QUARTER 1993, *supra* note 211, at 2.

214. N.Y. COMP. CODES R. & REGS. tit. 11, § 39 (1992). *See supra* note 123 and accompanying text.

215. In addition to those who purchased lifetime coverage, ten New York participants bought policies with five years of nursing home and ten years of HHC benefits, another five persons bought policies with six years of nursing home and twelve years of HHC coverage. NEW YORK QUARTERLY UPDATE, THIRD QUARTER 1993, *supra* note 211.

product that has passed strict state scrutiny even when Medicaid spend-down is not an issue.

The ratio of LTC insureds to non-insureds is improving either because of or in spite of programs like ILTCP. Hence the stream of private-pay patients and the access to quality care is likely to increase under this system because the incentive for private initiatives is in place.

*5. Problems with Design.*—Although each partnership program has idiosyncratic quirks and flaws, the major shortcoming of these plans is that the asset protection feature is not portable. Like all LTC policies, benefits are paid no matter where in the United States the insured receives care.[216] A person who purchases regular LTC insurance in Montana or Kentucky or in any state may retire to the Sun Belt without fear of losing policy benefits, although he or she may be underinsured if the benefit purchased is less than the average daily costs of care in the new state. For obvious reasons, a state like Florida or Arizona or South Carolina, which is stumbling under its own Medicaid burdens, will not honor a transient LTC user's asset protection program. Even those states participating in RWJF programs like ILTCP do not reciprocate asset protection because of the differences in: 1) regional fluctuations in the average cost of care; 2) state regulations regarding standards and requirements of LTC insurance coverage; and 3) state Medicaid budgets and the way Medicaid is administered in each state.[217] If Grandma buys an ILTCP policy she may move to another state and will still be insured, but if she wants to preserve her asset protection, she must return to an Indiana facility (or receive HHC in an Indiana residence) before the policy benefits are exhausted.[218]

Lack of reciprocity and portability is a major factor preventing a nationwide system of state partnership programs. The federal Medicaid program, or similar public fund, would have to intervene, possibly making state reimbursements with regional cost factors similar to the current Medicare system. Otherwise a national partnership program, affecting the federal portion of Medicaid expenditures rather than state Medicaid budgets, may be needed to assure portability. This is particularly important if the goal is to encourage younger persons to purchase LTC insurance as they are apt to be more mobile before they retire or need LTC. Some tradeoffs are necessary in any LTC solution and it appears that for the partnership programs, at least for now, portability is being traded for the desired benefits of high quality, affordable insurance, state Medicaid cost containment and the prevention of personal impoverishment.[219]

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216. *Questions & Answers*, PARTNERS (Indiana Long Term Care Program, Family & Social Servs. Admin., Indianapolis, Ind.), Summer 1995, at 4 [hereinafter PARTNERS, Summer 1995).

217. McKay Interview, *supra* note 91; *Spreading the Partnership*, PARTNERS (Indiana Long Term Care Program, Family & Social Servs. Admin., Indianapolis, Ind.), Autumn 1995, at 2.

218. PARTNERS, Summer 1995, *supra* note 216, at 4.

219. McKay Interview, *supra* note 91.

## IV. RECOMMENDATIONS

As discussed earlier, no single private or public solution exists. ILTCP fits somewhere toward the "private" end of the continuum and is only part of the solution. The possibility of private-public mixes is endless and a survey of all the possible combinations and their projected effects on public costs is beyond the scope of this Note. However, this author recommends the following public sector complements to ILTCP as one possibility for a more complete package and comprehensive solution: 1) increased public education and pursuit of better data on national LTC use; 2) tax incentives for employers who provide cost-effective group LTC coverage; 3) federal mechanisms that promote portability of the asset protection feature; and 4) small increases in affirmative taxes to pay for inevitable public spending increases, preferably in a limited estate recovery system and with limited additional regressive taxes.

### *A. Educating the Public and Generating Quality Information*

Notwithstanding the heightened media and consumer attention on health care reform, the myth that LTC costs are covered by Medicare still exists. People needing extended care are not aware that options for HHC and community programs exist,[220] and in many areas of the country these alternatives are undeveloped. The government's strongest contribution would be to dispel these mistaken beliefs and to remove the nursing home bias inherent in the current Medicare and Medicaid systems. In addition, for national programs and the private insurance industry to anticipate the risks and costs of their respective programs, they must have better information on the actual needs among senior Americans for all types of LTC. It is essential that studies and feedback on Medicare and Medicaid not only track nursing home use obtained on known users, but they should also track data on the informal care provided by family members as well as care that some people forego because it is unaffordable or because they do not want to go to a nursing home. A more informed public and government will be better prepared to plan for the risks, develop solutions to LTC financing, and adapt to changes in LTC use.

### *B. Financial Incentives*

For national LTC reform to succeed, ILTCP and its counterparts need assistance from national public mechanisms that provide additional incentives for private responsibility. The asset protection feature of private-public cooperatives encourages elderly people who are closest to the risk of using LTC to buy insurance. However, this feature is limited by state lines and it does not provide incentives for younger persons to obtain protection. A discriminatory tax incentive in favor of younger purchasers is likely to meet with constitutionality challenges. Moreover, tax incentives are likely to benefit only the higher income groups, leaving out a significant portion of the partnerships' target market.

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220. *See supra* notes 58-59 and accompanying text.

A more effective approach is to award tax credits to employers who sponsor, in whole or in part, their employees' participation in more cost-effective group LTC insurance plans. This will work to encourage and infuse younger, healthier people into the insurance system, normalizing the risk pool. Because nearly one-third of all its partnership sales are group- or employer-sponsored purchases, Connecticut's partnership program enjoys the lowest average age of partnership buyers at fifty-nine years old.[221] Meanwhile, the average age of an ILTCP participant is sixty-nine years old because until very recently ILTCP had no group ILTCP policies approved.[222]

Due to administrative economies, group plans are more cost effective and premiums, whether paid entirely by the employer or shared with the employee, are lower. In addition, group plans encourage purchases by younger individuals.[223] When insureds purchase at younger ages, adverse selection costs are reduced and more people are insured. When more people are insured, more private dollars fund the full costs of LTC, making it more affordable to improve the quality of care by hiring more or better-skilled caregivers. Thus, employer- and group-sponsored plans are crucial to the success of LTC reform because they boost the participation of private-payors and help normalize the risk pool with younger, healthier insureds. To that end, several recent bills[224] have called for tax clarifications where LTC insurance would be treated like medical insurance for both employers and employees. Therefore, the premiums individuals pay would be included in the present medical expense exemption, and employer-paid premiums would be deductible expenses.[225]

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221. Memorandum from the Connecticut Partnership for Long-Term Care to the National Partnership for Long Term Care 5 (May 10, 1995) (on file with author) [hereinafter Connecticut Quarterly Figures, First Quarter 1995]. Cumulative statistics show 32% of Connecticut's purchasers were *under* the age of 65. *Id.* New York's purchasers averaged 68 years of age, 40% of them were under age 65, with only 6% of purchases in the first quarter of 1995 coming from group or organization sales. NEW YORK QUARTERLY UPDATE, FIRST QUARTER 1995, *supra* note 123, at 5. California's program, aside from sales by the California Public Employees' Retirement System, has not approved group policies. According to cumulative statistics (7/94 to 3/31/95), the average age of their partnership buyer was 68, with only 27% of those under the age of 65. CALIFORNIA PARTNERSHIP FOR LONG-TERM CARE, QUARTERLY REPORT 3 (1995).

222. ILTCP UNIFORM DATA, THIRD QUARTER 1993, *supra* note 143. Group policies were not available until the fourth quarter of 1994. *Id.* *See also* PARTNERS, Autumn 1994, *supra* note 207, at 2. Group sales represented 2% and 7% of all partnership sales for the fourth quarter 1994 and first quarter 1995 respectively. With the advent of group sales, about 33% of ILTCP's buyers were under age 65. ILTCP UNIFORM DATA, FIRST QUARTER 1995, *supra* note 212, at 4.

223. The average age of partnership beneficiaries in group sales in Connecticut, Indiana, and New York were 59, not reported, and 62, respectively, compared to the average age for individual purchasers of 64, 69, and 68, respectively. Connecticut Quarterly Figures, First Quarter 1995, *supra* note 221, at 2; ILTCP UNIFORM DATA, FIRST QUARTER 1995, *supra* note 212, at 4; NEW YORK QUARTERLY UPDATE, FIRST QUARTER 1995, *supra* note 123.

224. *See, e.g.*, H.R. 8, 104th Cong., 1st Sess. (1995).

225. *Id.*

### *C. Portability of Asset Protection as Additional Incentive*

Younger consumers, who will not face the potential for long term care for another twenty, thirty or more years, and who are more likely to be mobile, will have a greater incentive to purchase a portable partnership policy. Support for a national federal partnership program has been rejuvenated by the Life Care Act, which would honor the asset protection feature in any state the insured receives care. Short of this national partnership for LTC, reciprocity of the asset protection feature could be achieved through federal reimbursement mechanisms that are rated for regional differences in cost of care.[226] A mechanism such as this could eliminate the portability problem with a nationwide system of state private-public cooperatives.

Alternatively, the federal government could enact standards on insurance companies by which a partnership purchaser in one state must be allowed to transfer his or her policy to another state's approved insurer without having to prove insurability and at premiums based on the age attained at the original purchase date. The insured may be required to purchase additional coverage if the average daily cost of care in the transferee state exceeds his or her maximum daily benefit. Government intervention through mechanisms such as these are costly, both in reimbursements and in administration. Moreover, an intervention such as this may appear to virtually federalize the insurance industry which is currently under state control. However, drastic measures similar to these may be necessary to induce younger individuals to purchase partnership policies and, thus, achieve a much larger and more diversified pool of insured LTC users.

### *D. Affirmative Taxes to Fund Public Costs*

Because the costs and use of LTC are likely to increase in the future, public expenditures are equally likely to increase. Public dollars are necessary to cover LTC costs for the indigent and uninsurable. Funding the public portion of LTC expense with compulsory payroll taxes, like those which pay for Social Security (OASI) and Medicare (SMI), is less politically palatable than increasing inheritance taxes. In a nationwide system of state partnership programs, states could increase their inheritance tax, which currently is negligible or nonexistent in some states, to fund care for the indigent and uninsurable. If, instead, a national partnership for LTC were to develop, an increase in federal estate tax could offset much of the increase from the "woodwork" effect and moral hazard. These death taxes, however, are inherently progressive and characteristically welfare-type taxes, which are politically unappealing.

An alternative inheritance tax that may be more acceptable is an estate recovery tax similar to the OBRA-93 requirement. With estate recovery, the "tax"

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226. Medicare uses similar mechanisms for physician and medical facility reimbursement. *See, e.g.*, Medicare Program; Changes to the Hospital Inpatient Prospective Payment System and Fiscal Year 1995 Rates; Correction, 59 Fed. Reg. 64,153 (1994) (to be codified at 42 C.F.R. §§ 412-13).

is limited to the LTC user and his or her family rather than distributed across generations and income groups. However, the current OBRA-93 requirements function to reverse the very carrot which creates incentives to purchase these LTC policies—the asset protection feature. It has discouraged several states from participating in partnership programs and would likely discourage consumers from purchasing these policies. The estate recovery tax would be easier to swallow, both by interested states and their consumer constituents, if it recovered only the most catastrophic public expenditures—nursing home costs. Additionally, such limitation on estate recovery would encourage consumers to choose HHC and community care whenever possible, reducing unnecessary institutionalization costs and keeping public expenditures as low as possible.

## CONCLUSION

Private-public cooperatives are a vital part of America's LTC reform and go the longest yard in putting this solution within manageable reach. Programs like ILTCP do not answer the needs of the indigent. Medicaid still remains a necessary and important financier of LTC for poor families, which is its intended purpose. Nor do the partnership programs protect the upper-middle and upper class citizens who can self-insure or pay for lifetime LTC private insurance. The partnerships do, however, provide a significant remedy for a large window of America's elderly who have few legitimate alternatives, and encourage them to plan now to take responsibility for their own LTC needs.

The solution for national LTC reform is within our grasp: "[a]lthough long-term care financing has been viewed as an insolvable problem, it is actually one of the more tractable social issues facing the United States. . . . [T]his issue has a range of known and feasible solutions."[227] The trick is choosing a solution with which American citizens can live. ILTCP is such a solution. When coordinated with public initiatives for a better-informed public and government, tax clarifications and other incentives for purchase, and increases in affirmative taxes to fund increasing public costs, ILTCP and its counterparts set forth an equitable, efficient and politically acceptable answer to the impending LTC crisis.

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227. Wiener & Hanley, *supra* note 53, at 83.

# "A PICTURE IS WORTH A THOUSAND WORDS"—THE PERMISSIBLE SCOPE OF DISCOVERY OF VIDEOTAPE IN CIVIL CASES: A BIFURCATION APPROACH

PATRICIA L. OGDEN*

## INTRODUCTION—THE DISCOVERY DILEMMA

"[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."[1] This quote from Justice Jackson's concurring opinion in *Hickman v. Taylor* eloquently articulates the struggle in the discovery process between the right to access all relevant information prior to trial in order to advance the goals of discovery[2] and the need to preserve effective trial preparation.[3]

This tension has been further heightened by the advent of modern camera and video technology, whose effectiveness as a tool in civil litigation has been due largely in part to its modest expense. Litigants use videotape evidence at trial to impeach witnesses, to refute the extent of the plaintiff's injuries, and to demonstrate the daily obstacles facing a personal injury victim as a result of the disputed event.[4] In addition, defendants use the tapes to prepare for depositions[5] and to evaluate the extent of the plaintiff's injuries for settlement purposes.[6]

This Note will discuss an opposing party's ability to gain discovery of surveillance videotape. Specifically, it will address the implications of the work product doctrine and explore the limitations that courts have imposed on the discovery of surveillance videotape in civil cases. Emphasis will be placed on differentiating between the rationale for and the uses of surveillance videotape that is to be introduced at trial and non-evidentiary videotape. A bifurcation approach

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1. Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

2. The goals of discovery include a method of narrowing and clarifying the issues between or among the parties and a way to ascertain the facts or information as to the existence or whereabouts of such facts. *Id.* at 501. *See also* Martin v. Long Island R.R., 63 F.R.D. 53, 54 (E.D.N.Y. 1974); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973) (Goals of discovery include speedy and effective dispute resolution); Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339, 341 (N.Y. App. Div. 1992) (The goals include ascertainment of truth); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782, 785 (Ariz. Ct. App. 1980); Crist v. Goody, 507 P.2d 478, 499 (Colo. Ct. App. 1972) (The goals include the elimination of surprise and encouragement of settlements).

3. Jenkins v. Rainner, 350 A.2d 473, 476 (N.J. 1976); *Martin,* 63 F.R.D. at 54.

4. Tricia E. Habert, *"Day in the Life" and Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits,* 97 DICK. L. REV. 305 (1993).

5. Denis P. Juge, *Proper Use of Surveillance Film,* FOR THE DEF., June 1990, at 8-9.

6. *Martin,* 63 F.R.D. at 54.

will be advanced to limit the pre-trial discovery of surveillance videotape to include only material to be presented at trial, as outlined in *Fisher v. National Railroad Passenger Corp.*[7] Further, potentially related areas under the new federal discovery rules will be explored in relation to surveillance videotapes.

## I. OVERVIEW

The issue of when surveillance videotape should be discoverable by the opposing party has its roots in cases addressing the admissibility of videotape at trial.[8] Courts addressing the discoverability issue have evaluated the admissibility of videotape evidence as they would photographic evidence.[9] However, difficulties with editorial manipulation, subtle jury bias, and the technical limitations of videotape evidence have led to inconsistent results.[10]

Similarly, courts addressing the issue of whether to allow discovery of surveillance videotape to the opposing party prior to trial have yielded grossly differing results.[11] Courts allowing discovery of the videotapes prior to trial consistently cite the liberal discovery doctrine of the Federal Rules of Civil Procedure.[12] Courts refusing discovery of surveillance videotapes base their rulings on the availability of other sources to the plaintiff,[13] local rules prohibiting

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7. 152 F.R.D. 145 (S.D. Ind. 1993).

8. *See generally* 3 WIGMORE ON EVIDENCE § 798 (Chadbourn rev. 1970); Wanda E. Wakefield, Annotation, *Discovery of Surveillance Photographs*, 19 A.L.R. 4th 1236 (1983 & Supp. 1994).

9. *See* Baird v. Campbell, 590 N.Y.S.2d 399, 400 (N.Y. Sup. Ct. 1992); Boyarsky v. G.A. Zimmerman Corp., 270 N.Y.S. 134, 137 (N.Y. App. Div. 1934). *See also* FED. R. EVID. 1001(2) (stating that photographs include "still photographs, X-ray films, video tapes, and motion pictures").

10. For a complete discussion of the problems associated with videotape evidence in general, see Sharon Panian, *Truth, Lies, and Videotape: Are Current Federal Rules of Evidence Adequate?*, 21 SW. U. L. REV. 1199 (1992).

11. For a general discussion of different courts' views on the discovery of videotape surveillance evidence, see 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2015 (1994).

12. *See* Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973) (noting that liberal discovery leads to the just and speedy determination of cases); Martin v. Long Island R.R., 63 F.R.D. 53, 54 (E.D.N.Y. 1974) (noting that the doctrine permits effective settlement discussions and effective trial preparation); Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339, 341 (N.Y. App. Div. 1992) (stating that liberal discovery helps to ascertain truth and accelerate the disposition of suits); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782, 785 (Ariz. Ct. App. 1980) (holding that the rules of discovery eliminate surprise and encourage settlement); Crist v. Goody, 507 P.2d 478, 499 (Colo. Ct. App. 1972) (discussing the fact that liberal discovery simplifies issues, eliminates surprises, and leads to the just settlement of disputes without having to go to trial); Marigliano v. Krumholtz, 603 N.Y.S.2d 1020, 1023 (N.Y. Sup. Ct. 1993) (stating that liberal open discovery is favored in New York).

13. *See* Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 152 (S.D. Ind. 1993)

discovery of impeachment materials,[14] or work product protection.[15] Although the majority of current decisions have held that videotapes to be used at trial must be provided to the opposing party in advance,[16] few courts have addressed the issue of whether non-evidentiary videotape[17] should be discoverable by the opposing party in a civil case.[18] The majority of the courts that have addressed this issue have allowed the discovery of *all* videotape, evidentiary and non-evidentiary, without careful analysis of the differences in the two types.[19] Few courts have considered the issue of the discoverability of non-evidentiary videotape in the context of the work product doctrine.[20]

The unpredictability of discovery and subsequent use of surveillance videotapes can have a dramatic impact on the outcome of a case. For example, in

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(refusing to allow discovery of non-evidentiary videotape, citing the fact that plaintiff had a readily available source of information, i.e., his own knowledge); United States v. O.K. Tire & Rubber Co., 71 F.R.D. 465, 467 (D. Idaho 1976) (discovery refused when the materials were available from other sources which the adverse party had not explored); Hikel v. Abousy, 41 F.R.D. 152, 155 (D. Md. 1966) (stating that the names of persons with knowledge of the facts were available to the plaintiff through interrogatories, enabling her own investigation); Ranft v. Lyons, 471 N.W.2d 254, 262 (Wis. Ct. App. 1991) (requiring a strong showing to warrant disclosure of work product, and noting that plaintiff was aware of her physical limitations and kept a diary of her activities after the accident).

14. *See* MacIvor v. South Pac. Transp. Co., No. 87-6424-E, 1988 WL 156743, at *2 (D. Or. June 9, 1988); Bogatay v. Montour R.R., 177 F. Supp. 269, 270 (W.D. Pa. 1959); Coyne v. Monongahela Connecting R.R., 24 F.R.D. 357, 358 (W.D. Pa. 1959).

15. *Ranft*, 471 N.W.2d at 260 (holding that surveillance videos are work product and not discoverable); Gay v. P.K. Lindsay Co., 666 F.2d 710, 713 (1st Cir. 1981) (reasoning that statements of witnesses in attorney's work product are not discoverable when the effect would be cumulative and deposition testimony was available); *Fisher*, 152 F.R.D. at 150 (holding that surveillance videos are work product; those videos not to be used at trial are not discoverable).

16. *Fisher*, 152 F.R.D. at 150; Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40 (E.D.N.C. 1995).

17. As used in *Fisher*, non-evidentiary videotapes are defined as those surveillance videotapes, taken of the plaintiff by the defendant, which the defendant does not currently intend to use at trial. *Fisher*, 152 F.R.D. at 150.

18. *Id.*

19. *See* Boyle v. CSX Transp., Inc., 142 F.R.D. 435 (S.D. W. Va. 1992); DiGiacobbe v. National R.R. Passenger Corp., No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987); Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160 (S.D.N.Y. 1986); Delvaux v. Ford Motor Co., 518 F. Supp. 1249 (E.D. Wis. 1981); Martin v. Long Island R.R., 63 F.R.D. 53 (E.D.N.Y. 1974); Zimmerman v. Superior Ct., 402 P.2d 212 (Ariz. 1965) (en banc); Suezaki v. Superior Ct., 373 P.2d 432 (Cal. 1962) (en banc) (cited in *Fisher*, 152 F.R.D. at 150); Olszewski v. Howell, 253 A.2d 77 (Del. Super. Ct. 1969); Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); Jenkins v. Rainner, 350 A.2d 473 (N.J. 1976); Boulware v. Triborough Bridge & Tunnel Auth., 613 N.Y.S.2d 580 (N.Y. Sup. Ct. 1994); Marigliano v. Krumholtz, 603 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1993).

20. *Fisher*, 152 F.R.D. at 150.

*Chiasson v. Zapata Gulf Marine Corp.*,[21] the Fifth Circuit found reversible error when the trial court permitted the defendant to show the jury a videotape without prior disclosure to the plaintiff. The jury subsequently found the plaintiff ninety percent liable for the injury based on contributory negligence. The surveillance tape showed the plaintiff engaged in activities such as sweeping the carpet, working under a car, and purchasing food. The appellate court, in reversing the lower court's decision, held that the plaintiff had a right to the substantive evidence prior to trial, and noted that such a preliminary viewing could have produced an early settlement.[22]

By contrast, in *DiMichel v. South Buffalo Railway*,[23] the New York Court of Appeals reversed the trial court (in *Poole v. Consolidated Rail Corp.*[24]) using an abuse of discretion standard. The plaintiff, who had accessed *all* the defendant's surveillance videotapes (which were not subsequently used by the defendant) during discovery, repeatedly referred to the tapes during trial and in closing statements, inferring that the defendants did not produce the tapes because they would have helped the plaintiff's case. The appellate court refused to allow the plaintiff to utilize the discovery process in such an underhanded way. Thus, consistency and predictability concerning the discovery of surveillance videotape remains crucial to a fair resolution of the dispute.

### *A. Purposes and Uses of Surveillance Films*

In certain civil cases, especially personal injury or workers' compensation cases, the use of surveillance videotape by the defendant, taken without the knowledge of the plaintiff, can be an "extremely useful tool."[25] Surveillance videotape serves two distinct purposes: it provides impeachment evidence[26] against the plaintiff,[27] and it provides substantive

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21. 988 F.2d 513 (5th Cir. 1993).

22. *Id.* at 516.

23. 604 N.E.2d 63, 69-70 (N.Y. 1992).

24. 579 N.Y.S.2d 772 (N.Y. App. Div. 1991).

25. Denis P. Juge, *Proper Use of Surveillance Film*, FOR THE DEF., June 1990, at 8.

26. Impeachment evidence does not relate to the claim or defense, but to the credibility of the witness. Paul C. Ney, *Videotape Surveillance in Civil Cases*, LITIG., Summer 1991, at 11. *See also* Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 517 (5th Cir. 1993) (stating that "impeachment evidence . . . is that which is offered to 'discredit a witness . . . to reduce the effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] or [her] testimony'") (quoting John P. Frank, *Pretrial Conferences and Discovery—Disclosure or Surprise?*, 1965 INS. L. J. 661, 664).

27. Juge, *supra* note 25, at 8. *See generally* 8 WRIGHT & MILLER, *supra* note 11, § 2015, at 113-121; R. L. Martyn, Annotation, *Discovery, in Civil Case, of Material Which is or may be Designed for Use in Impeachment*, 18 A.L.R.3d 922 (1968 & Supp. 1994); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973) (stating that "[o]ne who has described in elaborate detail his disabilities, their extent and duration, and the limitations they impose may be shown by the camera to be a fraud").

evidence[28] which, by refuting the extent of the plaintiff's disability, may reduce damages. Defendants typically resist the disclosure of impeachment evidence, claiming nondisclosure will prevent plaintiffs from exaggerating their claims, thereby keeping the testimony honest.[29] Moreover, the value of impeachment testimony lies in preventing the plaintiff from viewing the tape prior to trial; otherwise, plaintiffs will be able to shape or mold their testimony to conform to the evidence on the tape.[30] Plaintiffs counter this argument with the need to authenticate the tape prior to trial[31] and to prepare effective cross examination,[32] as well as the assertion that revealing all evidence prior to trial will promote effective dispute resolution.[33] When the tape will be used for substantive evidence to dispute the degree of the plaintiffs' injury, most courts will allow pre-trial

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28. Juge, *supra* note 25, at 8. "Substantive evidence is that which is offered to establish the truth of a matter to be determined by the trier of fact." *Chiasson*, 988 F.2d at 517 (citing John P. Frank, *Pretrial Conferences and Discovery—Discovery or Surprise?*, 1965 INS. L.J. 661, 664).

29. *See* Kenneth E. Siemens, *The Discoverability of Personal Injury Surveillance and Missouri's Work Product Doctrine,* 57 MO. L. REV. 871 (1992). *See also* Smith v. CSX Transp., Inc., No. 93-373-CIV-5-F, 1994 WL 762208, at *2 (E.D.N.C. 1994) (asserting that denial of discovery would "discourage successful perjury"); *Sneaa*, 59 F.R.D. at 150 (stating the "possibility that such pictures exist will often cause the most blatant liar to consider carefully the testimony he plans to give under oath"); Hikel v. Abousy, 41 F.R.D. 152, 155 (D. Md. 1966) (noting that in those cases where the plaintiff would be influenced by the possibility of the defendant's possession of the videotape, it would probably tend to make the testimony more honest); Jenkins v. Rainner, 350 A.2d 473, 476 (N.J. 1976) (discussing defendant's claim that nondisclosure would keep plaintiff from exaggerating claim, and striking the argument in favor of more liberal discovery).

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> If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in 'knowing the truth before trial' is prompted primarily by a desire to find the most plausible way to defeat the truth.

Margeson v. Boston & Me. R.R., 16 F.R.D. 200, 201 (D. Mass. 1954); *see also* Olszewski v. Howell, 253 A.2d 77, 78 (Del. Super. Ct. 1969). *But see* DiMichel v. South Buffalo Ry., 604 N.E.2d 63, 68 (N.Y. 1992) (striking down defendant's motion on this basis); *Jenkins,* 350 A.2d at 473 (same).

31. *Snead*, 59 F.R.D. at 150; *accord* Martin v. Long Island R.R., 63 F.R.D. 53 (E.D.N.Y. 1974); Boldt v. Sanders, 111 N.W.2d 225 (Minn. 1961); Marte v. Hickok Mfg. Co., 552 N.Y.S.2d 297 (N.Y. App. Div. 1990).

32. *Snead*, 59 F.R.D. at 150; *Jenkins*, 350 A.2d at 477 ("[T]he surprise which results from distortion of misidentification is plainly unfair. If it is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished."); Dodson v. Persell, 390 So. 2d 704, 706 (Fla. 1980) (asserting that if pre-trial disclosure is not required, "plaintiffs will be without means to effectively challenge or prepare rebuttal evidence").

33. Wegner v. Cliff Viessman, Inc., 153 F.R.D. 154, 159 (N.D. Iowa 1994); *Smith,* 1994 WL 762208, at *2; *Martin*, 63 F.R.D. at 54.

disclosure to the plaintiffs.[34]

*B. Background: Courts' Approaches to Discoverability of Videotapes*

*1. Impeachment Evidence.*—Historically, some courts have refused the plaintiff discovery of videotape or other *impeachment* evidence prior to trial, weighing the defendant's need to prevent disclosure more heavily than the plaintiff's need to authenticate the evidence and prepare effective cross examination.[35] Other courts have adopted the opposite position, allowing the discovery of impeachment videotape.[36] In so doing, several courts have emphasized the importance of validating the authenticity of the video prior to trial to prevent fraud.[37] The case most cited relating to the need to authenticate the videotape before trial is *Snead v. American Export-Isbrandtsen Lines, Inc.*, which notes:

> The main purpose for secret motion pictures of a plaintiff is to

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34. *See, e.g., Wegner*, 153 F.R.D. at 159 (en banc); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782 (Ariz. Ct. App. 1980); Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1972); Simons v. State Compensation Mut. Ins. Fund, 865 P.2d 1118 (Mo. 1993).

35. *See* Gay v. P.K. Lindsay Co., 666 F.2d 710, 713 (1st Cir. 1981) (refusing to allow plaintiff to discover statements of defendant's witnesses prior to trial, citing plaintiff's knowledge of the area and little additional value of statements); MacIvor v. Southern Pac. Transp. Co., No. 87-6424-E, 1988 WL 156743, at *2 (D. Or. June 9, 1988) (holding that impeachment is not discoverable, citing local rules of court). *See also* FED. R. CIV. P. 26(b), advisory committee's note (stating that impeachment materials are generally protected from discovery).

36. *See* Boyle v. CSX Transp., Inc., 142 F.R.D. 435, 437 (S.D. W. Va. 1992); Forbes v. Hawaiian Tug & Barge Corp., 125 F.R.D. 505, 508 (D. Haw. 1989) (allowing impeachment video to be discovered provided impeaching character is preserved via deposition); Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986); Boldt v. Sanders, 111 N.W.2d 225, 228 (Minn. 1961) (holding that the impeachment evidence does not prevent discovery of information solely on that basis). *See also* 8 WRIGHT & MILLER, *supra* note 11, § 2015, at 115 (criticizing the approach that allows a party to select the purpose for which surveillance evidence will be used and thus obtain immunity from discovery by selecting impeachment purposes).

37. In *Boldt v. Sanders*, the court noted:

> Defendant's entire argument proceeds on the premise that defendant's evidence which plaintiffs seek to elicit constitutes the unblemished truth which, if prematurely disclosed, will prevent defendant from revealing to the jury the sham and perjury inherent in plaintiffs' claims. While defendant disclaims such an assumption, it is implicit in his position that witnesses whose testimony is designed to impeach invariably have a monopoly on virtue and that evidence to which the attempted impeachment is directed is, without exception, fraudulent.

111 N.W.2d at 227; *cf.* 4 JAMES W. MOORE ET AL., FEDERAL PRACTICE ¶ 26.21 (2d ed. 1994); *accord Martin*, 63 F.R.D. at 53 (reasoning if the videotape is to be used at trial, it is discoverable to authenticate tape); Marte v. Hickok Mfg. Co., 552 N.Y.S.2d 297, 300 (N.Y. App. Div. 1990) (holding that all videotape to be used at trial is discoverable). *See generally* Wanda E. Wakefield, Annotation, *Discovery of Surveillance Photographs,* 19 A.L.R.4th 1236 (1983 & Supp. 1994).

> impeach his credibility. Films taken without the knowledge of the subject often have a dramatic impact in court. One who has described in elaborate detail his disabilities, their extent and duration, and the limitations they impose may be shown by the camera to be a fraud. The possibility that such pictures exist will often cause the most blatant liar to consider carefully the testimony he plans to give under oath.
>
> On the other hand, the camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events . . . . Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false.[38]

*2. Local Rules on Impeachment Evidence.*—In denying the discovery of impeachment videotape, other courts cite their local rules of evidence prohibiting discovery of impeachment evidence as an exception to the overall discovery rules.[39] These courts often note that the Federal Rules of Civil Procedure[40] allow each district court, upon a majority vote, to amend the rules governing practice, as long as the local rules do not conflict with the federal rules.[41] However, the only circuit court to speak on the issue rejected decisions that were based on local rules prohibiting discovery of impeachment evidence as unlawfully narrowing the scope of discovery under the federal rules.[42]

*3. Impeachment v. Substantive Evidence.*—Recently, many courts have ordered the discovery of impeachment videotape on the grounds that the tapes also contain substantive evidence and should therefore be accessible to the plaintiff before trial.[43] Indeed, it can generally be said that in the midst of all the confusion

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38. Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973) (citation omitted).

39. *See* Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 150 (S.D. Ind. 1993) (noting that S.D. Ind. L.R. 16.1(f)(5) excludes impeachment evidence from pre-trial discovery and provides that "[a] list of exhibits to be offered at trial [are to be disclosed at final pre-trial conference] except those to be used solely for *impeachment* or rebuttal" (emphasis added)); MacIvor v. South Pac. Transp. Co., No. 87-6424-E, 1988 WL 156743, at *3 (D. Or. June 9, 1988); Bogatay v. Montour R.R., 177 F. Supp. 269, 270 (W.D. Pa. 1959).

40.

> Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules . . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

41. *Id. See also* Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 515 (5th Cir. 1993).

42. *Chiasson*, 988 F.2d at 516-17.

43. *See* DiMichel v. South Buffalo R.R., 604 N.E.2d 63, 66 (N.Y. 1992); Zimmerman v.

over what type of evidence surveillance materials represent, the weight of modern authority allows the discovery of surveillance videotapes *if* they are to be used at trial.[44] Still other courts have ruled that surveillance videotapes are *primarily* substantive evidence, and therefore discoverable on those grounds.[45]

*4. Evidentiary v. Non-Evidentiary Surveillance Videotape.*—Few courts have analyzed the differences between evidentiary and non-evidentiary videotape.[46] In fact, because most of the courts that have addressed the issue have allowed the discovery of *all* videotape, they did not undertake further analysis.[47] Finally, few

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Superior Ct., 402 P.2d 212, 217 (Ariz. 1965) (holding that surveillance evidence, although helpful for impeachment, also contains substantive evidence *relevant* to the matter litigated, and is therefore discoverable); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782, 785 (Ariz. Ct. App. 1980).

44. *See* DiGiacobbe v. National R.R. Passenger Corp., No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987) (holding that plaintiff had a right to know of the *existence* of video regardless of whether it would be used at trial; plaintiff had a right to discover the actual video only if defendant intended to use it at trial); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973) (holding that surveillance video must be produced in advance if it is to be used at trial); Dodson v. Persell, 390 So. 2d 704, 706 (Fla. 1980); Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339, 344 (N.Y. App. Div. 1992) (holding that plaintiff is entitled to the pre-trial examination of all evidence that defendant intends to offer at trial); Spencer v. Beverly, 307 So. 2d 461, 462 (Fla. Dist. Ct. App. 1975), where the court reasoned:

> Much confusion exists as a result of the attempt to differentiate between substantive evidence and impeachment evidence. For example, here the movies are described by petitioner as impeachment evidence and therefore not subject to discovery. However, if they are at all effective will they not also be substantive evidence going directly to the petitioners' injuries and damages? Thus, it seems to me it is time to articulate a rule everyone can understand and use as a guide, namely: if a party possesses material he expects to use as evidence at trial, that material is subject to discovery.

45. *See Chiasson*, 988 F.2d at 513 (finding the surveillance tape discoverable on substantive grounds); Crist v. Goody, 507 P.2d 478, 480 (Colo. Ct. App. 1972) (holding that surveillance movies were "primarily substantive evidence and not totally or even basically impeachment evidence").

46. For cases that differentiate between the two types, see Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 150 (S.D. Ind. 1993) (allowing discovery of evidentiary videotape but refusing to allow discovery of non-evidentiary video); *Dodson*, 390 So. 2d at 707 (allowing discovery of evidentiary video and discovery of non-evidentiary video depending on whether the evidence was unique and otherwise unavailable); *Spencer*, 307 So. 2d at 462 (allowing discovery of evidentiary video and discovery of non-evidentiary video depending on work product privilege).

47. *See* Boyle v. CSX Transp., Inc., 142 F.R.D. 435 (S.D. W. Va. 1992); Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160 (S.D.N.Y. 1986); Delvaux v. Ford Motor Co., 518 F. Supp. 1249 (E.D. Wis. 1981); Martin v. Long Island R.R., 63 F.R.D. 53 (E.D.N.Y. 1974); Suezaki v. Superior Ct., 373 P.2d 432 (Cal. 1962) (en banc); Olszewski v. Howell, 253 A.2d 77 (Del. Super. Ct. 1969); *Dodson*, 390 So. 2d at 704; Collins v. Crosby Group, Inc., 551 So. 2d 42 (La. Ct. App. 1989); Boldt v. Sanders, 111 N.W.2d 225 (Minn. 1961); Jenkins v. Rainner, 350 A.2d 473 (N.J. 1976).

decisions have addressed this bifurcation in the context of the work product doctrine.[48]

## II. THE WORK PRODUCT DOCTRINE

The work product doctrine, first described in *Hickman v. Taylor*,[49] remains a viable restriction on the overall liberal discovery policy of the federal rules.[50] Although not within the absolute privilege afforded the attorney-client privilege,[51] work product receives a two-tiered protection. First, the mental impressions and opinions of the attorney during trial preparation receive an absolute protection.[52] Second, basic work product, such as information or materials gathered in anticipation of litigation, acquires a qualified immunity and is only discoverable upon a showing of necessity for the materials in prosecuting the case.[53]

### *A. The Beginning—Hickman v. Taylor*

In the landmark case of *Hickman v. Taylor*,[54] the Supreme Court adopted a middle position between the federal district court and the court of appeals, by holding that an attorney's "work product" should receive qualified immunity from the normal discovery process.[55] The court stated that "until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a

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48. *See Fisher*, 152 F.R.D. at 150.

49. 329 U.S. 495 (1947).

50. The court in *Hickman v. Taylor* agreed with the general proposition that discovery rules should be accorded a broad and liberal treatment. "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Id.* at 507. However, the court still concluded that the attempts of the plaintiff, without justification or necessity, to secure written statements, private memoranda, and personal recollections of the defense attorney prepared in anticipation of litigation fell "outside the arena of discovery and contravene[d] the public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. For general information and background on the work product doctrine, see also 8 WRIGHT & MILLER, *supra* note 11, §§ 2022-28, at 183-240 and Edward H. Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969).

51. *Hickman*, 329 U.S. at 508.

52. *Id.* at 510 (stating "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney"). *See also* FED. R. CIV. P. 26 (b)(3) (stating that the "court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation").

53. "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *Hickman*, 329 U.S. at 511. *See also* FED. R. CIV. P. 26 (b)(3) (stating "a party may obtain discovery of documents and tangible things . . . only upon a showing . . . that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means").

54. 329 U.S. 495 (1947).

55. *Id.* at 510; 8 WRIGHT & MILLER, *supra* note 11, § 2022, at 318.

situation of this nature as a matter of unqualified right."[56]

In *Hickman*, a tugboat named the *J.M. Taylor* sank, without explanation, killing five of the nine crew members. Representatives of the deceased crew members brought suit against the tug owners. The four surviving crew members were examined at a public hearing within one month of the accident, and the testimony was made available to all interested parties. Additionally, the tugboat owner's counsel, after receiving notice of suit by two of the five parties, interviewed the survivors and others connected with the accident and obtained written statements. A year later the plaintiffs filed interrogatories for production of any written statements and for exact provisions of any oral statements to be set forth in detail. The defendant challenged the interrogatories as an attempt to gain access to the attorney's files and thoughts of counsel.[57] Although the district court held the material was not privileged, the Third Circuit reversed.[58]

The Supreme Court laid out the qualified immunity of the doctrine.[59] Work product would be discoverable only upon a substantial showing of necessity or justification.[60] The Court drew a further distinction for any work product that may reflect the mental impressions or opinions of counsel, stating that for all practical purposes, these were immune from discovery.[61]

What constitutes work product is, however, limited. Even the *Hickman* Court distinguished between documents prepared in anticipation of litigation and *facts* learned by counsel during the investigation process.[62] Since *Hickman*, an overwhelming majority of courts have held that facts discovered during trial preparation are not immune from discovery, and are not protected as work

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56. *Hickman*, 329 U.S. at 514.

57. *Id.* at 499.

58. *Id.* at 499-500.

59. 8 WRIGHT & MILLER, *supra* note 11, § 2022, at 318.

60. *Hickman*, 329 U.S. at 510.

61.

> But as to oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.

*Id.* at 512-13.

62. "A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." *Id.* at 504. For additional discussion of this topic, see 8 WRIGHT MILLER, *supra* note 11, § 2023, at 326 ("The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery."); Cooper, *supra* note 50, at 1282.

product.[63]

### *B. Current Theory—Federal Rules of Civil Procedure—Rule 26*

After the *Hickman* decision, courts struggled to solve the interpretive problems left open by the *Hickman* holding.[64] The 1970 amendments to the Federal Rules of Civil Procedure codified the *Hickman* holding in Rule 26(b)(3).[65] However, even after the codification of the rule, debate still continues as to the interpretation of the language and whether there should be work product protection at all.[66]

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63. *See* Milwaukee Concrete Studios v. Greely Ornamental Concrete Prod., 140 F.R.D. 373 (E.D. Wis. 1991); Protective Nat'l Ins. Co. v. Commonwealth, Ins. Co., 137 F.R.D. 267 (D. Neb. 1989); Dunn v. State Farm Ins., 122 F.R.D. 507 (N.D. Miss. 1988); Laxalt v. McClatchy, 116 F.R.D. 438 (D. Nev. 1987); DiGiacobbe v. National R.R. Corp., No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987); Eoppolo v. National R.R. Passenger Corp., 108 F.R.D. 292 (E.D. Pa. 1985); Ford v. Phillips Elecs. Instruments Co., 82 F.R.D. 359 (E.D. Pa. 1979); United States v. Glaxo Group, Ltd., 302 F. Supp. 1 (D.D.C. 1969); Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524 (M.D.N.C. 1967); McCall v. Overseas Tankship Corp., 16 F.R.D. 467 (S.D.N.Y. 1954); Baltimore Transit Co. v. Mezzanotti, 174 A.2d 768 (Md. 1961); Jenkins v. Rainner, 350 A.2d 473 (N.J. 1976). *See generally* 8 WRIGHT & MILLER, *supra* note 11, § 2023, at 326-35.

64. *See generally,* 8 WRIGHT & MILLER, *supra* note 11, § 2022, at 318-26.

65. The current version of Rule 26(b)(3) reads as follows:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order.

FED. R. CIV. P. 26(b)(3). Although the 1993 amendments made significant changes to other parts of Rule 26, especially part (a), which broadens the scope of material that must be automatically disclosed to the other party at the commencement of the suit, the section on work product did not receive substantial revisions. *See infra* Part V.C. for an analysis of the significant changes to the other parts of Rule 26.

66. For discussion in support of the work product doctrine, see generally Cooper, *supra* note

According to Rule 26(b)(3), materials must meet three tests to fall within the Rule's work product protection. The material must be a "document or tangible thing,"[67] prepared in anticipation of litigation or trial,[68] and by or for another party or by or for that party's representative.[69]

### *C. Required Showing to Overcome Work Product Immunity*

Documents that fall within work product protection are still discoverable upon a showing of sufficient necessity.[70] The issue of whether the petitioner has demonstrated such a showing has been hotly litigated.[71] To meet this burden, there

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50. For a discussion opposing the work product protection, see Elizabeth G. Thornburg, *Rethinking Work Product,* 77 VA. L. REV., 1515 (1991). For additional discussion of the work product doctrine, see Jeffrey F. Ghent, Annotation, *Development Since* Hickman v. Taylor *of Attorney's "Work Product" Doctrine*, 35 A.L.R.3d 412 (1971 & Supp. 1994).

67. "Documents or tangible things" set out the requirement under 26(b)(1) of those things that fall within the scope of discovery. FED. R. CIV. P. 26(b)(1); 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 196.

68. Work product protection only applies to documents prepared due to the prospect of litigation, not to documents prepared in the normal course of business that may eventually be used in the litigation. 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 199. Cases that held the documents were *not* prepared in anticipation of litigation, but during the regular course of business, and therefore discoverable, include: Binks v. National Presto Indus., Inc., 709 F.2d 1109 (7th Cir. 1983); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Colten v. United States, 306 F.2d 633 (2d. Cir. 1962); Henderson v. Zurn Indus., 131 F.R.D. 560 (S.D. Ind. 1990); Scott Paper Co. v. Ceilcote Co., 103 F.R.D. 591 (D. Me. 1984); Technograph, Inc. v. Texas Instruments, Inc., 43 F.R.D. 416 (S.D.N.Y. 1967); Hogan v. Zletz, 43 F.R.D. 308 (N.D. Okla. 1967). Cases that held the documents were prepared in anticipation of litigation, and therefore immune from discovery, include: Lett v. State Farm Fire & Casualty Co., 115 F.R.D. 501 (N.D. Ga. 1987); Carver v. Allstate Ins. Co., 94 F.R.D. 131 (S.D. Ga. 1982). *See generally,* 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 336-69.

69. Work product protection thus extends to things prepared by the attorney or his agent. After the 1970 and 1993 amendments, the protection clearly includes the party's indemnitors, insurance company's attorneys, and other consultants as long as the documents are being prepared because of the prospect of litigation. FED. R. CIV. P. 26(b)(3); 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 204-07; *id.* § 2023, at 196-97.

70. FED. R. CIV. P. 26(b)(3); 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 211.

71. For cases discussing the plaintiff's burden in establishing a sufficient showing of necessity, see Republic Gear Co. v. Borg Warner Corp., 381 F.2d 551, 558 (2d Cir. 1967) (showing by plaintiff that disclosure would be helpful held insufficient); Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 152 (S.D. Ind. 1993) (sufficient showing not made); Henderson v. Zurn Indus., 131 F.R.D. 560, 572 (S.D. Ind. 1990) (insufficient showing by plaintiff); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F. Supp. 736, 743 (N.D. Ill. 1962) (no showing by plaintiff of sufficient necessity); Newton v. Yates, 353 N.E.2d 485, 496-97 (Ind. Ct. App. 1976); DiMichel v. South Buffalo Ry., 604 N.E.2d 63, 68 (N.Y. 1992) (substantial need shown). For additional cases and discussion, see also 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 211-28; Ghent, *supra* note 66.

must be a substantial need for the materials in the preparation of the case, *and* the petitioner must show an inability, without undue hardship, to obtain the substantial equivalent of the materials by other means.[72] Finally, even if this initial burden is met, any portion of the document that reflects the mental impressions, opinions, legal theories, or conclusions of the opposing counsel will still be protected.[73]

## III. SURVEILLANCE VIDEOTAPE AS WORK PRODUCT V. NON-WORK PRODUCT

When defendants have asserted the work product doctrine to prevent discovery of surveillance videotapes prior to trial, the results have been mixed.[74] Some courts have flatly rejected the work product defense in this context, citing the broad goals of the discovery process.[75] Others have allowed the videotape as work product, but have held that plaintiffs met their burden per se as the film is unique and not easily duplicated.[76] Still other courts that have recognized videotape as

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72. FED. R. CIV. P. 26(b)(3). What constitutes substantial need in case preparation and substantial hardship in acquiring the materials from other sources has been frequently litigated. For example, when a witness is no longer available, or has a faulty memory, courts have ruled the deposition discoverable. 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 216-17. By contrast, the assertion by a plaintiff that he wishes to ensure that he has not overlooked anything, or that he surmises that the document may be helpful for impeachment purposes is not strong enough to meet this burden. *Id.* Additionally, courts have held that when the information is available from an alternative source, the plaintiff has not demonstrated "substantial need." *Fisher*, 152 F.R.D. at 152. For a complete discussion and cases on this issue, see 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 211-28.

73. FED. R. CIV. P. 26(b)(3). For a general discussion of the protection afforded the attorney's mental impressions, see 8 WRIGHT & MILLER, *supra* note 11, § 2026, at 229-32. The authors noted that the decision in *Hickman v. Taylor* was based primarily on protecting the thought processes of attorneys. *Id.* at 230. In *Hickman*, the court noted that in performing their duties, it was essential that attorneys "work with a certain degree of privacy, free from unnecessary intrusions by opposing parties and their counsel." Hickman v. Taylor, 329 U.S. 495, 510 (1947).

74. *See supra* notes 15, 63 and accompanying text.

75. *See* Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 104 (E.D.N.C. 1993); Boyle v. CSX Transp., Inc., 142 F.R.D. 435, 437 (S.D. W. Va. 1992); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782, 784 (Ariz. Ct. App. 1980); Spencer v. Beverly, 307 So. 2d 461, 462 (Fla. Ct. App. 1975) (noting that "[t]he weight of authority is that photographs and movies are not considered work product and are discoverable"); Marte v. W. O. Hickok Mfg. Co., 552 N.Y.S.2d 297 (N.Y. App. Div. 1990); Marigliano v. Krumholtz, 603 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1993).

76. Wegner v. Cliff Vessman, Inc., 153 F.R.D. 154, 159 (N.D. Iowa 1994); Martin v. Long Island R.R., 63 F.R.D. 53, 54 (E.D.N.Y. 1974); Olszewski v. Howell, 253 A.2d 77, 78 (Del. Super. Ct. 1969); Jenkins v. Rainner, 350 A.2d 473, 477 (N.J. 1976); DiMichel v. South Buffalo Ry., 604 N.E.2d 63, 69 (N.Y. 1992) (holding visual evidence of this kind unique as it memorializes a set of conditions and can never be replicated); Ancona v. Net Realty Holding Trust Co., 583 N.Y.S.2d 784, 788-89 (N.Y. Sup. Ct. 1992); Prewitt v. Beverly-50th Street Corp., 546 N.Y.S.2d 815, 816 (N.Y. Sup. Ct. 1989); Cabral v. Arruda, 556 A.2d 47, 50 (R.I. 1989).

work product have employed more of a balancing approach, weighing the plaintiff's need to authenticate the tape and prepare for trial against the defendant's need to protect trial strategy and to preserve the impeachment value of the tapes.[77]

### *A. Current Debate on Discoverability of Videotape Generally*

Since the dramatic increase in the use of videotape surveillance during the last two decades, due to the availability of equipment, ease of use, and decreasing costs,[78] court decisions regarding the discoverability of the videotape prior to trial have divided roughly into four categories: 1) those allowing discovery of all videotape regardless of the intended use,[79] 2) those allowing discovery only of videotape to be used at trial,[80] 3) those allowing discovery of videotape only after the deposition of the plaintiff,[81] and 4) those refusing the discovery of videotape.[82]

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77. Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40 (E.D.N.C. 1995); Smith v. CSX Transportation, Inc., No. 93-373-5-F, 1994 WL 762208, at * 3 (E.D.N.C. May 18, 1994); Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 151 (S.D. Ind. 1993) (explaining that the party demonstrating a "substantial need" to justify discovery of the document "involves a balancing of the value of broad discovery as an accurate method of arriving at a full resolution of each dispute with the corresponding need to prevent undue intrusion into the attorney's preparation of her case"); Milwaukee Concrete Studios Ltd. v. Greely Ornamental Concrete Prod., 140 F.R.D. 373, 376 (E.D. Wis. 1991); DiGiacobbe v. National R.R. Passenger Corp., No. Civ. A. 86-534, 1987 WL 11227, at * 2 (E.D. Pa. 1987); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973); *DiMichel*, 604 N.E.2d at 190 (stating that the court must fashion a rule that "respects a defendant's qualified right to keep videotapes prepared in anticipation of litigation private, but that at the same time advances the policy of liberal disclosure"); Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339, 344 (N.Y. App. Div. 1992); Carrecia v. Enstrom, 578 N.Y.S.2d 678, 680 (N.Y. App. Div. 1992) (holding the elements necessary for plaintiff to establish her burden are not inherent in the nature of visual evidence; plaintiff bears burden to prove need); Ranft v. Lyons, 471 N.W.2d 254, 261 (Wis. Ct. App. 1991).

78. *See* James P. Conners, *Surveillance Video Discoverability—Are We Protecting the Fraudulent Claimant?*, FOR THE DEF., July 1994, at 22.

79. *See Boyle*, 142 F.R.D. at 435; Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986); Delvaux v. Ford Motor Co., 518 F. Supp. 1249, 1252 (E.D. Wis. 1981); *Martin*, 63 F.R.D. at 54; Zimmerman v. Superior Ct., 402 P.2d 212, 213 (Ariz. 1965); Suezaki v. Superior Ct., 373 P.2d 432, 438-39 (Cal. 1962); *Olszewski*, 253 A.2d at 78; Dodson v. Persell, 390 So. 2d 704, 705 (Fla. 1980); *Jenkins*, 350 A.2d at 477.

80. *See* Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513 (5th Cir. 1993); Forbes v. Hawaiian Tug & Barge Corp., 125 F.R.D. 505 (D. Haw. 1989); Carlton v. National R.R. Passenger Corp., No. Civ. A. 86-5215, 1987 WL 7607, at *2 (E.D. Pa. March 6, 1987); *Snead*, 59 F.R.D. at 148; Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782 (Ariz. Ct. App. 1980); Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1972); Collins v. Crosby Group, Inc., 551 So. 2d 42 (La. Ct. App. 1989); Shenk v. Berger, 587 A.2d 551 (Md. Ct. Spec. App. 1991); Williams v. Dixie Elec. Power Ass'n, 514 So. 2d 332 (Miss. 1987); *Kane*, 587 N.Y.S.2d at 344.

81. *See Forbes*, 125 F.R.D. at 505; *Martin*, 63 F.R.D. at 53; Blyther v. Northern Lines, Inc.,

Courts that have differentiated their decision based on whether the videotape's intended use was evidentiary or non-evidentiary have allowed the discovery of non-evidentiary videotape only in exceptional circumstances,[83] or when the non-evidentiary videotape did not fall within work product protection.[84]

The majority of recent decisions regarding the discoverability of videotape surveillance materials have dealt with videotapes that were either anticipated as trial evidence or actually presented at trial.[85] However, even these opinions were careful in their holdings to limit the applicability of discovery to videotape materials the defendant intended to use at trial, thus implicitly identifying that a difference existed between the two types of uses.[86]

The courts that permit plaintiffs to discover all the videotape in the defendant's possession, regardless of the intended purpose of the tapes, have adopted a blanket approach by relying upon the liberal discovery policy of the federal rules, without performing a careful analysis of the distinguishing, underlying rationale for non-evidentiary videotape use.[87] For example, in *Boyle*

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61 F.R.D. 610 (E.D. Pa. 1973); *Snead*, 59 F.R.D. at 151; *Williams*, 514 So. 2d at 332; *Jenkins*, 350 A.2d at 473; *Kane*, 587 N.Y.S.2d at 346.

82. Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 145 (S.D. Ind. 1993); MacIvor v. Southern Pac. Transp. Co., No. 87-6424-E, 1988 WL 156743, at *2 (D. Or. June 9, 1988); Lett v. State Farm Fire & Casualty Co., 115 F.R.D. 501 (N.D. Ga. 1987); Flynn v. Church of Scientology Int'l, 116 F.R.D. 1 (D. Mass. 1986); United States v. O.K. Tire & Rubber Co., 71 F.R.D. 465 (D. Idaho 1976); Bird v. Penn Cent. Co., 61 F.R.D. 43 (E.D. Pa. 1973); Hikel v. Abousy, 41 F.R.D. 152 (D. Md. 1966); Kriskey v. Chestnut Hill Bus Co., No. CV 87 0090900 S, 1990 WL 284343, at *2 (Conn. Super. Ct. May 9, 1990); Ranft v. Lyons, 471 N.W.2d 254 (Wis. Ct. App. 1991).

83. *Dodson*, 390 So. 2d at 707.

84. Spencer v. Beverly, 307 So. 2d 461, 462 (Fla. Ct. App. 1975).

85. *See* Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513 (5th Cir. 1993); *Forbes*, 125 F.R.D. at 506; DiGiacobbe v. National R.R. Passenger Corp., No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987); Carlton v. National R.R. Passenger Corp., Civ. A. No. 86-5215, 1987 WL 7607, at* 2 (E.D. Pa. Mar. 6, 1987); *Snead*, 59 F.R.D. at 148; Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782 (Ariz. Ct. App. 1980); Crist v. Goody, 507 P.2d 478 (Colo. Ct. App. 1973); *Dodson*, 390 So. 2d at 704; Collins v. Crosby Group, Inc., 551 So. 2d 42 (La. Ct. App. 1989); Shenk v. Berger, 587 A.2d 551, 555 (Md. Ct. Spec. App. 1991) (admitting if for substantive evidence); *Williams*, 514 So. 2d at 332; *Kane*, 587 N.Y.S.2d at 346; Cabral v. Arruda, 556 A.2d 47 (R.I. 1989).

86. *See, e.g., Snead*, 59 F.R.D. at 151 (concluding that the defendant must disclose tapes to plaintiff *if* he desires to use them at trial).

87. *See* Boyle v. CSX Transp., Inc., 142 F.R.D. 435 (S.D. W. Va. 1992); Daniels v. National R.R., 110 F.R.D. 160 (S.D.N.Y. 1986); Delvaux v. Ford Motor Co., 518 F. Supp. 1249 (E.D. Wis. 1981); Martin v. Long Island R.R., 63 F.R.D. 53 (E.D.N.Y. 1974); Zimmerman v. Superior Ct., 402 P.2d 212 (Ariz. 1965) (en banc); Suezaki v. Superior Ct., 373 P.2d 432 (Cal. 1962) (en banc); Olszewski v. Howell, 253 A.2d 77 (Del. Super. Ct. 1969); *Dodson*, 390 So. 2d at 704; Johnson v. Archdiocese of New Orleans, 649 So. 2d 12 (La. Ct. App. 1995); *Collins*, 551 So. 2d at 42; Jenkins v. Rainner, 350 A.2d 473 (N.J. 1976).

*v. CSX Transportation, Inc.*,[88] the court, after discussing the advantages of complete disclosure and early discovery, held that the defendant, "after the passage of sufficient time for deposing those surveilled, [shall] make available for inspection and copying all films and tapes taken in connection with the surveillance."[89] Further, the court did not discuss any fact pattern that would warrant such broad disclosure; instead, it limited its comments to a general policy discussion and decided the case on that basis.[90]

Similarly, in *Daniels v. National Railroad*,[91] the district court ordered the production, for the plaintiff's inspection, of "not only those portions of film or tape which it intends to introduce at trial, but all films or tapes of the defendant in its possession."[92] The court's rationale was again the broad and liberal discovery policy of the rules.[93] Finally, in *Olszewski v. Howell*,[94] the court resorted to a very similar approach, discussing the plaintiff's need to authenticate the technique of filming and editing the moving pictures taken of the plaintiff as good cause for disclosure of all the tape.[95]

To summarize, none of the courts that adopted the blanket discovery approach considered the different policy considerations that accompany an attempt to discover non-evidentiary videotape.[96] As discussed in *Fisher v. National R.R. Passenger Corp.*,[97] most of the factors that weigh heavily in favor of the plaintiff when the film is used in evidence drop out when the defendant does not intend to use the tape at trial.[98]

### *B. Work Product Doctrine and the Non-evidentiary Videotape*

*1. The Fisher Case.*—The most recent case to explore the differences between evidentiary and non-evidentiary videotape in relation to discovery needs under the work product doctrine was *Fisher v. National Railroad Passenger Corp.*[99] The district court in *Fisher* held that the plaintiffs failed to meet their burden of establishing substantial need necessary to overcome the protection afforded the

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88. 142 F.R.D. 435 (S.D. W. Va. 1992).

89. *Id.* at 437.

90. *Id.*

91. 110 F.R.D. 160 (S.D.N.Y. 1986).

92. *Id.* at 161.

93. *Id.*

94. 253 A.2d 77 (Del. Super. Ct. 1969).

95. The court noted that "moving picture evidence is subject to misuse by splicing, angle of shooting, misleading condensation, selective lighting, either natural or artificial, and many other variables." *Id.* at 78.

96. For a discussion of these policy issues, see Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145 (S.D. Ind. 1993).

97. *Id.*

98. These reasons include the need to authenticate the tape for accuracy, prepare an effective cross examination, and prevent unfair surprise and lengthy delays. *Id.* at 152-54.

99. 152 F.R.D. 145 (S.D. Ind. 1993).

non-evidentiary videotape by the work product doctrine. In *Fisher*, employees sued their employer under the Federal Employer's Liability Act (FELA) for injuries suffered during employment. The employer secretly videotaped the employees to obtain impeachment evidence at trial. When the plaintiffs submitted interrogatories regarding the existence of videotape or pictures and requests for production of all tapes in the employer's possession, the defendant agreed to and did produce, after deposing the plaintiffs, the single videotape it intended to use as impeachment evidence at trial. When the plaintiffs made subsequent demands for all videotape taken, the defendant objected, based on the work product doctrine as well as the local rule protecting impeachment evidence from discovery.[100]

In a well reasoned opinion, the district court balanced the plaintiff's need to discover the non-evidentiary videotape with the employer's need to protect its trial preparation materials.[101] After noting and accepting the reasoning in *Snead v. American Export-Isbrandtsen Lines, Inc.*,[102] allowing discovery of videotape to be used at trial, the court examined whether the plaintiff had met the burden of "substantial need" required to overcome the employer's work product protection for the non-evidentiary videotapes.[103]

*2. Plaintiff's Rationale.*—The plaintiff offered three distinct reasons why he had a "substantial need" for the non-evidentiary tapes.[104] First, the tapes may have contained substantive evidence that could be necessary in trial preparation.[105] The court rejected this argument, stating that the plaintiff had another readily available source of information regarding his injuries, i.e., his own knowledge and testimony, and it noted that the "[e]xistence of a viable alternative to invading work product, will, in most situations--and in this case--negate any substantial need."[106]

The plaintiff's second argument focused on the need to ensure proper use of the video by the defendant, such as preventing the showing of the tapes to potential witnesses to "taint" their testimony.[107] The court similarly rejected this reason, stating that "[c]ompelling production of the tapes will not alleviate this risk because Defendant could still show the videos to witnesses."[108]

Finally, the plaintiff asserted a "substantial need" to view the non-evidentiary videotape in order to assist in investigation and potentially impeach the producer of the film.[109] The court, in rejecting this argument, differentiated between the plaintiff's need to examine any evidentiary tape to be used at trial for

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100. *Id.* at 148.
101. *Id.* at 151.
102. 59 F.R.D. 148 (E.D. Pa. 1973).
103. *Fisher*, 152 F.R.D. at 151-52.
104. *Id.* at 152.
105. *Id.*
106. *Id.*
107. *Id.* at 153-54.
108. *Id.* at 154.
109. *Id.*

discrepancies,[110] thus decreasing the possibility of surprise at trial, and the lack of a similar basis for non-evidentiary tapes. The district court further noted that "mere surmise, on Plaintiff's part, that the non-evidentiary tapes may prove some assistance in impeaching the evidentiary tape is insufficient to breach attorney work product."[111] Thus, in assessing the plaintiff's stated needs for the non-evidentiary tapes, the court held that denying access to the tapes would not unduly prejudice the preparation of plaintiff's case or cause him any hardship or injustice,[112] as required to overcome work product immunity.[113]

### *C. Other Courts Distinguishing Evidentiary and Non-evidentiary Videotape*

Although no other opinion has explored in detail the bifurcation approach outlined in *Fisher*, several courts have identified the issue of balancing the different needs present in evidentiary versus non-evidentiary videotape discovery.[114] In *DiMichel v. South Buffalo Railway*,[115] the New York Court of Appeals upheld the appellate court's decision, which had reversed the trial court's order for discovery of *all* the tapes, and allowed the plaintiff to discover *only* the tape to be used at trial.[116] In addition, the same court reversed the lower court's ruling of harmless error in *Poole v. Consolidated Rail Corp.*,[117] in which the defendant had been required to disclose *all* videotapes taken of the plaintiff prior to trial, even though the defendant did not subsequently use all the tapes at trial. The New York Court of Appeals noted the particularly egregious conduct of the plaintiff's attorney who referred to the existence of the tapes several times during the trial itself, further prejudicing the defendant to the jury.[118] The Court of Appeals carefully pointed out, however, that it did not address the specific issue of whether non-evidentiary videotape *should* be discoverable by the plaintiff prior to trial or at all.[119]

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110. *Id.* The court in *Fisher* noted that authentication of evidentiary videotape was the predominant reason that courts allow discovery needs to override the work product protection of the tapes. *Id.* at 154 (citing Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150-51 (E.D. Pa. 1973) and Forbes v. Hawaiian Tug & Barge Corp., 125 F.R.D. 505, 508 (D. Haw. 1989)).

111. *Id.* at 155.

112. *Id.* This was the language used by the court in *Hickman* to explain the burden the plaintiff must overcome to negate work product protection. Hickman v. Taylor, 329 U.S. 495, 508 (1947).

113. *Fisher*, 152 F.R.D. at 155-56.

114. *See* Spencer v. Beverly, 307 So. 2d 461 (Fla. Dist. Ct. App. 1975); DiMichel v. South Buffalo Ry., 604 N.E.2d 63 (N.Y. 1992).

115. 604 N.E.2d 63 (N.Y. 1992).

116. *Id.* at 69.

117. 579 N.Y.S.2d 772, 773 (N.Y. App. Div. 1991), *rev'd*, DiMichel v. South Buffalo Ry., 604 N.E.2d 63 (N.Y. 1992) (consolidated action including *Poole v. Consolidated Rail Corp.*).

118. *DiMichel*, 604 N.E.2d at 69.

119. *Id.* at 65-66.

Similarly, in *Spencer v. Beverly*,[120] the Florida appellate court distinguished between evidentiary videotape to be used at trial, and non-evidentiary tape,[121] summarizing its position as follows:

> Thus, it seems to me it is time to articulate a rule everyone can understand and use as a guide, namely: if a party possesses material he expects to use as evidence at trial, that material is subject to discovery . . . . Of course, the converse of that is not necessarily true. If a party possesses matter that is relevant or material to the case but does not intend to use it at trial, it may or may not be the subject of discovery, depending upon whether it is privileged as work product.[122]

At least two state courts, discussing surveillance videotape materials in the context of the work product doctrine, have recognized an inherent difference in the discoverability of evidentiary and non-evidentiary videotape.[123] In *Cabral v. Arruda*,[124] the court distinguished evidentiary surveillance materials in which the plaintiff's burden of proving "substantial burden" and "undue hardship" was inherently established by the need to authenticate the tape to be used from the situation where the defendant's intended use of the video was only to aid in trial preparation or to examine the extent of the plaintiff's injuries.[125] In the latter situation, the court ruled the plaintiff's burden of proof had not been established per se and would require a higher showing to overcome the work product protection afforded the non-evidentiary videotape.[126]

Similarly, in *Dodson v. Persell*,[127] the court held that any material to be used as evidence at trial ceases to have work product protection and is discoverable.[128] However, the court further held that the content of surveillance materials not intended to be submitted as evidence was subject to discovery only if they were "unique and otherwise unavailable, and materially relevant to the cause's issues."[129]

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120. 307 So. 2d 461 (Fla. Dist. Ct. App. 1975).

121. *Id.* at 462.

122. *Id.* (citation omitted).

123. *See* Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); Cabral v. Arruda, 556 A.2d 47 (R.I. 1989).

124. *Cabral,* 556 A.2d at 47.

125. *Id.* at 50.

126. *Id.* The court stated:

> However, in circumstances where a lawyer creates or causes to have created surveillance materials solely for his or her own use, such material is work product and thus qualifiedly immune from discovery. The mere existence of such materials alone does not constitute a showing of undue hardship to overcome qualified immunity under Rule 26(b)(2).

*Id.* at 50-51.

127. 390 So. 2d 704 (Fla. 1980).

128. *Id.* at 707.

129. The court gave the example of a photograph of a scene that had changed or could not

These decisions touched upon the basic policy differences required between the two types of videotape evidence, but did not discuss non-evidentiary tapes in detail. Where the videotape is to be used by the defendant only for trial preparation, the rationale for early discovery by the plaintiff simply does not apply (i.e., the need for authentication, and the need to prepare effective cross examination), and the defendant's need for privacy regarding trial preparation materials outweighs the plaintiff's need.

### *D. "Substantial Need" Rationale for Evidentiary and Non-evidentiary Videotape*

As the court in *Fisher* correctly concluded, basic differences exist between evidentiary and non-evidentiary videos regarding the requirements the plaintiff must demonstrate in order to establish a substantial need strong enough to overcome the work product immunity afforded by Rule 26(b)(3).[130] When dealing with a videotape to be used against the plaintiff at trial, the plaintiff's need to authenticate the tape and to prepare effective cross examination and the broad discovery policy of preventing unfair surprise, preventing costly delays, and effecting a speedy resolution to the dispute weigh in the plaintiff's favor.[131] These reasons fail, however, when the defendant does not intend to use the video at trial. The need for authentication and the need to prepare cross examination based on the content of the tapes becomes minimal if the jury will not view the tapes.[132] The plaintiff's desire to find helpful impeachment or substantive evidence from the tapes is precisely the type of discovery the *Hickman* decision opposed as an invasion of the attorney's work product.[133] Additionally, the defendant has a stronger need with non-evidentiary video to prevent the plaintiff from unjustly benefiting from the defendant's investigatory efforts, and revealing his trial strategy.

## IV. STANDARDS FOR ANALYSIS—POLICY CONSIDERATIONS

The spectrum of analysis for the discoverability of evidentiary and non-evidentiary videotape ranges from refusing to acknowledge the tapes as work

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be reproduced as a unique circumstance where work product protection would be overcome. *Id.* To support this position, the court used a broad interpretation of a passage from Hickman v. Taylor, 329 U.S. 495 (1947), equating *facts* remaining hidden in an attorney's file in *Hickman* with the surveillance evidence in the instant case. *Dodson*, 390 So. 2d at 708 (citing *Hickman*, 329 U.S. at 511).

130. Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 155 (S.D. Ind. 1993).

131. *See supra* note 2.

132. *See Fisher*, 152 F.R.D. at 155.

133. "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." Hickman v. Taylor, 329 U.S. 495, 507 (1947). "Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [the attorney's] professional activities." *Id.* at 513.

product,[134] to recognizing the tapes as work product but using a per se approach in analyzing the plaintiff's burden for showing a substantial need for the tapes,[135] to a balancing of the plaintiff's and defendant's needs in determining if work product protection has been overcome.[136] Because court approaches have encompassed a broad spectrum, ranging from a blanket policy to be applied in all cases[137] to a careful analysis based on the facts of each case,[138] it is little wonder that, in the quagmire of approaches employed, few courts have differentiated the varying factors present between evidentiary and non-evidentiary videotapes.

The overall policy underlying the discovery issue is the intent of the federal rules to facilitate a liberal discovery process in which adversaries share essential facts to eliminate surprise and foster speedy dispute resolution.[139] This goal must always be tempered with the right of the parties to a certain amount of privacy in trial preparation, as delineated by the work product doctrine.[140] This balancing of interests implies a need for careful, fact sensitive analysis by the courts in evaluating whether plaintiffs, in a given fact situation, have met their burden of demonstrating substantial need for the tapes in preparation of the case. As noted in *Fisher*,[141] the plaintiff who attempts to access non-evidentiary videotape bears a higher burden to overcome the defendant's right to work product protection.[142] This directly correlates to the decreased need for the tapes when they will not be used at trial, absent exceptional circumstances.[143] Therefore, the most effective approach in these cases results from the balancing approach employed by many recent court decisions, looking at the facts of the case and weighing the relative needs of the plaintiff against those of the defendant.

Decisions such as *Fisher v. National Railroad Passenger Corp.*,[144] *DiMichel v. South Buffalo Railway*,[145] *Spencer v. Beverly*,[146] and *Dodson v. Persell*,[147] weighed the intended use of the videotape evidence against the opposing counsel's need to access the film and arrived at well-reasoned bases to allow or disallow discovery. Their careful approach avoided the pitfalls encountered by the trial courts in *Chiasson v. Zapata Gulf Marine Corp.*[148] and *Poole v. Consolidated Rail*

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134. *See supra* note 75.
135. *See supra* note 76.
136. *See supra* note 77.
137. *See supra* note 79.
138. Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145 (S.D. Ind. 1993).
139. *See supra* note 2.
140. Hickman v. Taylor, 329 U.S. 495, 510 (1947).
141. *Fisher*, 152 F.R.D. at 145.
142. *Id.* at 151-52.
143. *See supra* note 83 and accompanying text.
144. 152 F.R.D. 145 (S.D. Ind. 1993).
145. 604 N.E.2d 63 (N.Y. 1992).
146. 307 So. 2d 461 (Fla. Dist. Ct. App. 1975).
147. 390 So. 2d 704 (Fla. 1980).
148. 988 F.2d 513 (5th Cir. 1993).

*Corp.*,[149] where a blanket approach resulted in reversible error and significant additional expense and delays in dispute resolution. Skillful analysis of the relevant factors in the case results in the proper application of the work product doctrine as intended when first identified by the Supreme Court in *Hickman*.

## V. Other Discovery Issues Relating to Surveillance Videotapes

### *A. State Statutes and Surveillance Videotapes—A Different Wrinkle*

In addition to the issue of discovery of surveillance videotapes under the work product doctrine, at least one state has enacted a civil statute requiring the full disclosure of "any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof . . . including out-takes, rather than only those portions a party intends to use."[150] In *Marigliano v. Krumholtz*,[151] the first case to deal with the discovery of tapes and memoranda after the statute was passed, the court held that the tapes and memoranda were discoverable by the plaintiff, after the memos had been redacted so as not to reflect the thoughts of the defendant's attorney.[152] The court, in arriving at this decision, cited the "open far-reaching disclosure policy" of New York and the liberal interpretation of the statute.[153] In two subsequent cases interpreting the statute, state courts have upheld the discovery of all videotapes, regardless of their planned use,[154] while at the same time refusing to expand the discovery rule to include materials used in preparation of the surveillance.[155] The Defense Bar has predicted a chilling effect on the defendant's use of surveillance film where uncertainty exists as to the extent to which the materials will be discoverable.[156]

Further, the issue of whether the discovered materials can subsequently be used by the plaintiff in its prima facie case remains unanswered.[157] The only case to address the issue was decided prior to the enactment of the statute.[158] In *Baird v. Campbell*,[159] the court refused to allow the plaintiff to use the defendant's videotape in the prima facie case, holding that the tapes were not "material and

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149. 579 N.Y.S.2d 772 (N.Y. App. Div. 1991).

150. N.Y. Civ. Prac. L. & R. § 3101(a)(i) (McKinney 1991 & amended 1993); *see* Conners, *supra* note 78, at 22.

151. 603 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1993).

152. *Id.* at 1022.

153. *Id.* at 1023.

154. Boulware v. Triborough Bridge & Tunnel Auth., 613 N.Y.S.2d 580 (N.Y. Sup. Ct. 1994).

155. Grossman v. Emergency Cesspool & Sewer Cleaners, Inc., 617 N.Y.S.2d 422 (N.Y. Sup. Ct. 1994); Weinhold v. Witte Heavy Lift, Inc., No. 90 Civ. 2096 (PKL), 1994 WL 132392, at * 3 (S.D.N.Y. April 11, 1994).

156. *See* Conners, *supra* note 78, at 24.

157. *Id.*

158. Baird v. Campbell, 590 N.Y.S.2d 399 (N.Y. Sup. Ct. 1992).

159. *Id.*

necessary" to the plaintiff's case, but refusing to carve out another exception to the liberal discovery doctrine.[160]

While the future impact of the New York statute is unknown, the statute clearly restricts work product protection for materials such as memoranda or transcripts that would have certainly been included under Rule 26(b)(3). Thus, the *Hickman* doctrine has been substantially diluted in New York.

### *B. FRCP, Discovery and The Expert Witness Rule—Does the Investigator Qualify?*

Another possibility exists that would impact the discoverability of surveillance videotape evidence. Under Rule 26(a)(2),[161] if the investigator who conducted the surveillance is utilized as an expert, the rule would compel full disclosure of what the expert knows prior to trial.[162] An expert is a witness who is qualified by knowledge, experience, skill, training, or education, and therefore is qualified to give an opinion.[163] Although there are no cases dealing with this issue directly, a recent Pennsylvania case addressed what information, given to an expert to form

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160. *Id.* at 402.

161. FED. R. CIV. P. 26(a)(2).

162. The rule directs:

> Except as otherwise stipulated or directed by the court, the disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; *the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions* . . . .

*Id.* (emphasis added). For general background on the expert witness rule, see Thomas R. Trenkner, Annotation, *Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure,* 33 A.L.R. FED. 403 (1977 & Supp. 1994).

163. According to FED. R. EVID. 702, the expert testimony rule reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education,* may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702. (emphasis added). Additionally, the advisory committee's notes stated:

> The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

FED. R. EVID. 702 (advisory committee's note on 1972 proposed rules).

an opinion, would be discoverable by the plaintiff. In *Corrigan v. Methodist Hospital*,[164] the court ruled that the defendant doctor had to disclose to the plaintiff patient *all materials* that had been provided to the expert for consideration, not merely the reports relied upon.[165]

By contrast, in an earlier case, *Gay v. Lindsay, Inc.*,[166] the First Circuit reached a different result on the same issue. The court held that certain correspondence documents provided to the expert witness by the defendant before trial were work product and not discoverable.[167] The rationale cited by the court referred to the minimal additional impeachment value the statements would have made, and that work product should remain protected when the person was available to be deposed.[168]

While the issue of what an expert private investigator would be required to disclose on the basis of the expert witness rule remains unanswered, the possibility exists that a court could order discovery of all surveillance materials within the investigator's knowledge, based on Rule 26(a)(2). The new rule goes even further to require automatic disclosure of all relevant material experts have utilized in forming the basis of their opinions. In the midst of this uncertainty, the most prudent course for defendants would be to avoid utilizing their investigators as expert witnesses.

### *C. Impact of the New Federal Discovery Rule*

The most recent revision to the discovery rules under Rule 26 significantly changed the method of discovery, requiring early and automatic disclosure of the types of information felt to be basic to the case,[169] and thus preventing undue

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164. 158 F.R.D. 54 (E.D. Pa. 1994).

165. *Id.* at 58.

166. 666 F.2d 710 (1st Cir. 1981).

167. *Id.* at 713.

168. *Id.*

169. Rule 26(a)(1) requires:

> Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without waiting a discovery request, provide to other parties:
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> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
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> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;
>
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which is based, including materials bearing on the nature and extent of injuries suffered.

FED. R. CIV. P. 26(a)(1).

delays in the discovery process.[170] The new rule provides for three types of self-executing disclosure: initial disclosure,[171] expert disclosure,[172] and pre-trial disclosure.[173] Although court interpretations of this new section remain uncertain, it would appear that the rule requires a party to disclose without request any documents or tangible things relating to the facts of the case in the party's possession within ten days after the initial meeting of the parties.[174] If taken literally by the courts, this provision could limit the scope of work product protection as it is known today. The uncertainty of the extent of mandatory disclosure under the new rule will challenge defendants and the courts in outlining the limits of the materials to be included under this provision.[175]

## CONCLUSION

Inconsistencies in federal and state decisions relating to the discoverability of videotapes by the plaintiff prior to trial have resulted from the multitude of

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170. The advisory committee for the 1993 amendments cited this rationale as the basis for the automatic disclosure provision, noting that many local rules already required such disclosure. FED. R. CIV. P. 26(a)(1) (advisory committee's note for 1993 amendments). The new mandatory disclosure rules have also generated significant criticism. *See, e.g.*, Carol Cure, *Discovery Reform and the Impending Death of the Adversary System*, FOR THE DEF., September 1995, at 21-26; Fred S. Souk, *No Disclosure!-No Discovery!-No Nonsense! Faster, Cheaper, Better Civil Justice*, FOR THE DEF., September 1995, at 28-31 (recommending complete change to the civil justice system and abolition of the discovery process).

171. Initial disclosure includes information in the following categories: the names, addresses, and telephone numbers of all persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings; a copy or description by category and location of all documents, data compilations, and tangible things in the party's possession relevant to the disputed facts; computation of damages claimed, with supporting documentation to be available for copying and inspection; and insurance policies which could satisfy the judgment. FED. R. CIV. P. 26(a)(1).

172. Experts who may testify at trial must be disclosed, along with a written report prepared and signed by the expert, including: a statement of the opinions to be expressed by the expert with the bases for the opinions; the data or information considered by the expert in forming the opinions; exhibits to be used to support or summarize the opinions; qualifications of the expert; compensation to be paid; and a list of cases in which the expert has testified at trial or by deposition in the last four years. FED. R. CIV. P. 26(a)(2).

173. The party must provide the following information about evidence it may present at trial (except impeachment evidence): name, address, and phone number of each witness, separating those the party will call from those they may call; a list of the witnesses whose testimony will be presented by deposition, and a transcript of the applicable portions; and a list of exhibits, including a summary of evidence, separating those that will be offered from those it will offer if necessary. FED. R. CIV. P. 26(a)(3).

174. FED. R. CIV. P. 26(a)(1).

175. Interestingly, to date at least 42 of the federal districts have opted out of or altered the mandatory initial disclosure requirements of FED. R. CIV. P. 26(a)(1).

analytical approaches employed by the various district courts and their varying interpretations of the federal rules. As the use of videotape surveillance continues to increase, the need for a consistent approach in dealing with this issue will become paramount. Given the nature of the material and the potential impact on the jury, the issue of whether the tapes are discoverable before trial will sometimes have a dramatic impact on the outcome of the trial.

Although the federal rules were enacted to provide a more uniform implementation of court procedure in the federal courts, this goal has been frustrated by the inconsistent application of the discovery rule to surveillance cases. The *Hickman* doctrine correctly identified that there are necessary limits to the materials a plaintiff should rightfully be able to discover, based on demonstrating a substantial need for the defendant attorney's work product. Many recent court decisions have reflected the belief that each case must be decided through the utilization of a balancing approach between the plaintiff's need to effectively prepare his case, and the defendant's need to protect his work product, and thus, trial strategy.

The balancing approach produces the most consistently fair results by addressing the parties' needs relative to the facts of the case. The bifurcation approach outlined in *Fisher v. National R.R. Passenger Corp.* reflects the most well-reasoned way to analyze the need for videotape discovery. When the tape has an intended evidentiary use, the plaintiff has a heightened need to authenticate the film before trial and to prepare an effective cross examination strategy. This also facilitates the discovery goals of speedy resolution of disputes. The defendant's need to preserve the impeachment value of the tape is safeguarded, as outlined in the *Snead v. American Export-Isbrandtsen Lines, Inc.* decision, by requiring the plaintiff to submit to a full deposition before being informed of the existence of the tape or being given the tape.

However, when the videotape is intended for non-evidentiary use, such as case preparation and evaluation of the extent of the plaintiff's injuries, the plaintiff's need to discover such material is greatly diminished, because the jury will not be exposed to the tape. This type of investigation falls within the work product protection as envisioned by the court in *Hickman v. Taylor.* To allow the plaintiff to invade the defendant's work product, absent unusual circumstances, would be to ignore the requirement of establishing substantial need. As discussed in *Fisher*, the plaintiff has an alternate source of information, i.e., his own knowledge and testimony, that would preclude discovery of this type of work product.

Although good policy reasons exist for allowing the plaintiff to discover evidentiary video prior to trial, these reasons are not present when dealing with non-evidentiary videotape. The plaintiff should be required to meet a higher burden to access this type of work product. Any rule which adopts a blanket policy approach without looking to the relative needs in the case runs the risk of inequitable decisions. That is not, and has never been, the intent of the federal rules.

# *CAMPBELL V. ACUFF-ROSE MUSIC, INC.*: THE RAP ON REMEDIES

JEFF TOOLE*

## INTRODUCTION

The traditional remedy for a copyright infringement has been an injunction.[1] However, on March 7, 1994, the Supreme Court rendered its opinion in *Campbell v. Acuff-Rose Music, Inc.*[2] In footnote ten of the opinion, the Court stated "that the goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use."[3] The Court also explained that in "special circumstances," where "'there may be a strong public interest in the publication of . . . [a] secondary work,'" a court may wish to refrain from issuing an injunction and "'award . . . damages for whatever infringement is found.'"[4] The primary focus of this Note will be to explore three possible interpretations of footnote ten and to determine when a court should allow an infringement to continue and award damages in lieu thereof.

To provide context for interpreting the *Campbell* opinion, Part I of this Note will outline the underlying policies of copyright law and the fair use doctrine as well as describe the traditional remedies awarded once an infringement is found. Part II will provide a detailed, factual account of the *Campbell* case and will briefly examine what many commentators view as the most important aspect of the *Campbell* decision: The Supreme Court's repudiation of its own dicta in earlier fair use decisions.[5] Part III of this Note will then explore three possible interpretations of footnote ten. The first proposes that courts should refrain from issuing an injunction whenever there is a great public interest in a work, regardless of the creative motivation and the published or unpublished status of the original work. The second asks courts to refrain from issuing an injunction in only those cases where there is a high degree of public interest in the work and the original work was created for purely private purposes. Finally, a third possible interpretation of footnote ten would award damages in lieu of an injunction and

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1. *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 582 (2d Cir. 1989) (recognizing that "injunctions generally are granted to prevent copyright infringement"); Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (holding that "if [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined"); Blackburn v. Southern California Gas Co., 14 F. Supp. 553, 554 (S.D. Cal. 1936) (holding that the customary remedy for a copyright infringement is an injunction or accounting).

2. 114 S. Ct. 1164 (1994).

3. *Id.* at 1171 n.10.

4. *Id.* (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1132 (1990)).

5. *See infra* note 72 and accompanying text.

allow the infringement to continue whenever the facts of a case closely parallel the prerequisites for invoking one of the compulsory licenses, as set forth in the Copyright Act of 1976.[6] This Note will reveal that neither the first nor the second theories comport with the underlying policy of copyright law, and it will conclude that the "compulsory license" approach is the most appropriate interpretation of the *Campbell* opinion's footnote ten.

## I. THE COPYRIGHT LAW

The laws of copyright can be traced to the Star Chamber Court[7] and the censorship laws of England in the 1500s.[8] In order to suppress the printing and teaching of the Protestant Reformist, the King granted to the Stationery Companies a monopoly over book publication by prohibiting printers from accepting anything not approved by the Star Chamber.[9] There was no intent to protect authors, the only goal was to suppress speech that the government believed rebellious or contrary to church doctrine.[10] Later, the Stationery Companies recognized copyright as a means for securing exclusive and perpetual rights in their works.[11] They asked the Crown to reform copyright laws and give them permanent rights.[12] From this process, the first copyright act emerged, the Statute of Anne.[13] The Statute secured to authors, as opposed to publishers, exclusive rights in their works for periods of time from fourteen to twenty-one years.[14] This concept of protecting the author's work was included in the United States Constitution.[15] The Constitution states that Congress is authorized "[t]o promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."[16]

Copyright law did not evolve solely to provide original authors absolute ownership and control of their works. Instead, it was designed to stimulate

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6. *See, e.g.*, 17 U.S.C. § 115 (1994) (compulsory license for making and distributing phonorecords).

7. *See generally* ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 8-9 (1917). The Star Chamber was established to monitor unlicensed printers and writers whose works were considered obnoxious to the church or state. *Id.*

8. LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 20-77 (1968).

9. Rick G. Morris, *Use of Copyrighted Images in Academic Scholarship and Creative Work: The Problems of New Technologies and A Proposed "Scholarly License,"* 33 IDEA 123, 124 (1993).

10. *Id.*

11. PATTERSON, *supra* note 8, at 25.

12. Morris, *supra* note 9, at 124.

13. Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19 (Eng.), *reprinted in* 5 MELVILE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7-5[A] app. (1994) [hereinafter NIMMER & NIMMER].

14. Morris, *supra* note 9, at 124.

15. *Id.*

16. U.S. CONST. art. I, § 8, cl. 8.

creative activity for the benefit and enrichment of the public.[17] To fulfill the Constitutional mandate of protecting authors, Congress passed the first copyright act in 1790;[18] subsequent acts frequently included major revisions and amendments.[19] The Copyright Act of 1976[20] has been amended several times, principally to accommodate new technologies and to conform with international law.[21] Notwithstanding its several amendments, the central philosophy of copyright law remains the same: To create a monopoly that rewards the individual author and benefits the public.[22] Without the protection of copyright, infringing users could quickly copy and distribute new works. The original authors would then be unable to fully reap financial benefits from their works, and publishers would be reluctant to invest in the publication and distribution of new works. In addition, the growth of the arts and the transfer of knowledge would be reduced because future authors would fear the infringement of their new works.[23]

Although the monopoly protection of copyright prohibited unauthorized duplication of an author's work, early courts and legal scholars recognized that a rigid adherence to the original author's monopoly power would, on occasion, stifle the very creativity that copyright law was designed to foster.[24] For example, if

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17. Pierre N. Leval, *Toward a Fair Use Standard,* 103 HARV. L. REV. 1105, 1107 (1990).

18. Morris, *supra* note 9, at 125.

19. *Id.*

20. 17 U.S.C. §§ 101-1101 (1994).

21. *See generally* J. Wesley Cochran, *Why Can't I Watch This Video Here? Copyright Confusion and Performance of Videocassettes & Videodiscs in Libraries*, 15 HASTINGS COMM. & ENT. L.J. 837 (1993) (discussing the applications of copyright law to the viewing of commercially prepared videocassettes and videodiscs in libraries).

22. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545-46 (1985) (copyright is intended to increase, not impede, the harvest of knowledge and the rights conferred by copyright are designed to assure contributors a fair return for their labors). In numerous decisions, the Supreme Court has explained the theory behind copyright in similar terms. *See, e.g.*, Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1029 (1994); Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

23. Robert B. O'Connor, *Rap Parodies?: An In-Depth Look at* Acuff-Rose Music, Inc. v. Campbell, 2 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 239, 240 (1992).

24. *See generally* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-25 (1985) (reviewing early English cases and reviewing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901)); *see also* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 281-91 (1970). Professor Breyer's article proposes "that the case for copyright in the book trade is not a strong one generally and is even weaker for some parts of that trade." *Id.* at 283-84. Professor Breyer suggests that while the copyright law should not be abolished, Congress should "hesitate to extend or strengthen it." *Id.* at 284. He argues that "the general case for copyright protection is weak." *Id.* at 350. *But see* Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer,* 18 UCLA L. REV. 1100 (1970). In response to Professor Breyer, Mr. Tyerman's article concludes that:

original authors were given a complete monopoly over their works, research efforts would be greatly curtailed because quoting and citing earlier works could be considered an infringement.[25] In response, the fair use doctrine evolved to protect the use of original works under proper circumstances.

### *A. The Fair Use Doctrine*

The fair use doctrine is defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without [the owner's] consent, notwithstanding the monopoly granted to the owner."[26] The fair use doctrine recognizes that there are circumstances in which the opportunity for fair use of copyrighted materials is thought necessary to fulfill copyright's purpose, which is "[t]o promote the Progress of Science and useful Arts."[27] As Justice Story explained, "[i]n truth, in literature, in science and in art, there are . . . few . . . things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."[28]

The fair use doctrine was first adopted in an American court in 1841 in the case *Folsom v. Marsh*.[29] In *Folsom*, Justice Story distilled the essence of the fair use doctrine from earlier English cases by explaining that a court should "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[30] Fair use remained exclusively a judge-made doctrine until the passage of the Copyright Act of 1976,[31] which codified the common law fair use doctrine as section 107.[32]

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> [T]he existing federal copyright structure provides a relatively efficient, and, most importantly, time-proven system for ensuring both that authors find it intellectually and financially profitable to write, and that the American publishing industry is capable of producing a broad spectrum of book titles, and not merely a few commercially popular books. Thus, considering the crucial role that printed material plays in an enlightened democratic society, it is essential that copyright protection for published books be continued in substantially its present form.

*Id.* at 1102-03 (citations omitted).

25. PATRY, *supra* note 24, at 15-17.

26. Rosemont Enters., Inc. v. Random House, Inc., 256 F. Supp. 55, 65 (S.D.N.Y. 1966); *see also* BLACK'S LAW DICTIONARY 598 (6th ed. 1990).

27. U.S. CONST. art. I, § 8, cl. 8.

28. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

29. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

30. *Id.* at 348.

31. 17 U.S.C. §§ 101-1101 (1994).

32. The statute states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news

Although the wording of the provision was revised several times, Congress intended for the courts to apply the doctrine in an equitable manner so that the goals of copyright might be furthered.[33] This intent was reflected in the drafting of section 107 which does not define the term "fair use," but instead gives examples of the types of uses that might be considered fair,[34] as well as four illustrative factors for courts to weigh on a case-by-case basis.[35]

The four factors include: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;"[36] the "nature of the copyrighted work;"[37] the "amount and substantiality of the portion used in relation to the copyrighted work as a whole;"[38] and "the

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> reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

*Id.* § 107.

33. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 62 (1976); S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

34. The statute sets forth examples of what may qualify as a fair use such as criticism, comment, news reporting, teaching, scholarship or research. 17 U.S.C. § 107.

35. *Id.*

36. *Id.* § 107(1). This language focuses a court's inquiry on the type of use being made, rather than the type of entity making the use. While not unrelated, they do not necessarily coincide. A profit-making company may on occasion engage in a noncommercial use and a nonprofit organization may use a work in a way that is blatantly commercial. *See* Lish v. Harper's Magazine Found., 807 F. Supp. 1090, 1101 (S.D.N.Y. 1992) (explaining that "the mere fact that . . . a non-profit organization . . . operates at a loss does not preclude a finding of 'commercial use'").

37. 17 U.S.C. § 107(2). Courts have interpreted this factor as permitting fair use more freely in cases involving informational works than those involving works of a creative nature. *See* Harper & Row Publishing, Inc. v. Nation Enters., 471 U.S. 539, 563-64 (1985) (observing that a fair use defense is more readily upheld with respect to factual works because "the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy").

38. 17 U.S.C. § 107(3). In general, the larger the volume or the greater the importance of what is taken, the greater the affront to the interests of the copyright owner and the less likely the

effect of the use upon the potential market for or value of the copyrighted work."[39] Congress intended these four factors to be only illustrative of what a court may consider when determining fair use.[40] Given the endless variety of situations and combinations of circumstances that can arise in a particular case, the formulation of exact rules is precluded, and courts often consider other factors beyond those set forth in the Copyright Act,[41] such as the good faith of the infringer, the good faith of the copyright owner, and the public's interest in the dissemination of a work.[42] Notwithstanding the potentially vast number of factors a court may consider when determining fair use, the policy behind both the copyright law and the fair use doctrine remains the same: "[t]o promote the Progress of Science and useful Arts."[43] Therefore, the Supreme Court has been careful to limit the scope of the fair use analysis to only those factors which achieve this objective.[44]

### *B. The Remedies Rap*

Regardless of what factors a court may use to determine infringement or fair use, sections 501 through 510 of the Copyright Act set forth the remedies available to a plaintiff when an infringement is found.[45] Under the current statutory language, a successful plaintiff is entitled to recover: (1) actual damages and any additional profits of the infringer not taken into account in computing actual damages;[46] (2) statutory damages;[47] or (3) a permanent injunction barring future

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taking will qualify as a fair use. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

39. 17 U.S.C. § 107(4). Not every type of market impairment opposes fair use under the fourth statutory factor. An adverse critical review of a book or a movie may impair the market for the original work. However, such a market impairment is not relevant to the fair use analysis. William F. Patry & Shira Pelmutter, *Fair Use Misconstrued: Profit Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L. J. 667, 688 (1990). Instead, the fourth factor disfavors a finding of fair use when the market is impaired because the quoted material or secondary use serves as a substitute or "supersede[s] the use of the original." Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

40. 17 U.S.C. § 101 ("The terms 'including' and 'such as' are illustrative and not limitative."); *see also* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 (explaining that the four factors are "in no case definitive or determinative, [but] provide some gauge for balancing the equities").

41. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N 5659, 5679.

42. Leval, *supra* note 17, at 1128-32.

43. U.S. CONST. art. I, § 8, cl. 8.

44. *See generally* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

45. 17 U.S.C. §§ 501-510 (1994).

46. *Id.* § 504(b).

47. *Id.* § 504(c). The actual damages, profits, and statutory damages outlined in section 504

infringement.[48] It is the latter of these remedies which will be the primary focus of the remainder of this Note.

Section 502 of the Copyright Act states that "[a]ny court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[49] Courts have traditionally interpreted this section as calling for the issuance of an automatic injunction whenever an infringement is likely to continue.[50] However, language in *Campbell v. Acuff-Rose Music, Inc.*[51] appears to reject this traditional approach of automatically issuing injunctions against future infringements.

## II. CAMPBELL V. ACUFF-ROSE MUSIC, INC.

### *A. Purging the Presumptions*

On March 7, 1994, the Supreme Court handed down its opinion in *Campbell v. Acuff-Rose Music, Inc.*[52] The issue before the Court was whether the rap group 2 Live Crew's commercial parody of Roy Orbison's song, *Oh Pretty Woman* was a fair use within the meaning of the Copyright Act of 1976.[53] In 1964, Roy Orbison and William Dees wrote the song *Oh Pretty Woman* and assigned their rights to Acuff-Rose Music, Inc. ("Acuff-Rose").[54] In 1989, Luther Campbell, a member of 2 Live Crew, wrote a song entitled *Pretty Woman* which he described

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are designed to compensate the copyright owner for losses from past infringement, and to prevent the infringer from unfairly benefiting from a wrongful act. 3 NIMMER & NIMMER, *supra* note 13, § 14.01[A]. They do not provide the infringer with a compulsory license to continue the infringement. Often, section 504 damages will be awarded along with an injunction to prevent future infringement.

48. 17 U.S.C. § 502 (1994).

49. *Id.*

50. *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 582 (2d Cir. 1989) (recognizing that "injunctions generally are granted to prevent copyright infringement"); Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) (holding that "if [a biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined"); Blackburn v. Southern California Gas Co., 14 F. Supp. 553, 554 (S.D. Cal. 1936) (holding that the customary remedy for a copyright infringement is an injunction or accounting).

51. *See supra* notes 1-4 and accompanying text.

52. 114 S. Ct. 1164 (1994). *Campbell* is one of only four cases in which the Supreme Court has addressed the issue of fair use since the enactment of the Copyright Act of 1976. The other three cases are: Steward v. Abend, 495 U.S. 207 (1990); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

53. *Campbell*, 114 S. Ct. at 1167.

54. *Id.* at 1168.

as intended, "through comical lyrics, to satirize the original work."[55] On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of *Oh Pretty Woman*, that they would give all credit for ownership and authorship of the original song to Acuff-Rose, and that they were willing to pay a fee for the use they wished to make of it.[56] Acuff-Rose refused permission.[57] Nonetheless, in the summer of 1989, 2 Live Crew released records, cassette tapes, and compact discs of *Pretty Woman* in a collection of songs entitled *As Clean As They Wanna Be*.[58]

Almost a year later and after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew for copyright infringement.[59] The district court granted summary judgment for 2 Live Crew reasoning that the commercial purpose of 2 Live Crew's song was not a bar to fair use. Instead, it viewed 2 Live Crew's version as a parody which "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song seems to them."[60] The district court also concluded that 2 Live Crew had taken no more than was necessary to "conjure up" the original in order to parody it; and that it was unlikely that 2 Live Crew's song could adversely affect the market for the original song.[61] The district court weighed these factors and held that 2 Live Crew's song was a fair use of Orbison's original.[62]

The Court of Appeals for the Sixth Circuit reversed and remanded.[63] Although it assumed for the purposes of its opinion that 2 Live Crew's song was a parody of the Orbison original, the court of appeals noted that the district court had put too little emphasis on the commercial nature of 2 Live Crew's use.[64] The court of appeals, relying on dicta from the Supreme Court's opinion in *Sony Corp. of America v. Universal City Studios, Inc.*,[65] "that every commercial use . . . is

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55. *Id.*

56. *Id.*

57. *Id.* The fact that Acuff-Rose denied Campbell permission could strengthen the fair use defense because the copyright law is designed to promote the progress of science and useful arts and should not allow an author to censor the use of his or her work. *See, e.g.*, Maxtone-Graham v. Burtchaell, 631 F. Supp. 1432, 1436 (1986). In *Maxtone-Graham* the copyright owner, who had denied the defendant permission to use the work, argued that the defendant could not claim fair use because the custom in the publishing industry was to not claim fair use after permission to quote copyrighted material had been denied. *Id.* The court held that "since the doctrine of fair use is a legal doctrine having Constitutional implications, it cannot be subject to definition or restriction as a result of any such trade custom or practice." *Id.*

58. *Campbell*, 114 S. Ct. at 1168.

59. *Id.*

60. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991).

61. *Id.* at 1157-58.

62. *Id.* at 1160.

63. Campbell v. Acuff-Rose Music, Inc., 972 F.2d 1429, 1439 (6th Cir. 1992).

64. *Id.*

65. 464 U.S. 417, 451 (1984).

presumptively . . . unfair," held that "the admittedly commercial nature" of the parody required the conclusion "that the first factor weighs against a finding of fair use."[66] Next, the court of appeals relied on dicta from another Supreme Court decision, *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[67] which concluded that every commercial use would adversely affect the original or derivative markets for the original work.[68] By interpreting the dicta in the two Supreme Court decisions as creating presumptions against fair use, the court of appeals held that 2 Live Crew's parody was an infringement of the Orbison original.[69]

The Supreme Court in reversing and remanding, criticized the court of appeals' limited analysis of the fair use factors.[70] The Court specifically observed that the Sixth Circuit erred in its elevation of the dicta in *Sony* to a per se rule and the Court explained that such an attempt to reduce the fair use test to an inflexible rule runs counter to the "common law tradition of fair use adjudication."[71]

### *B. Additional Dicta*

Several commentators and scholars have praised the Supreme Court's opinion in *Campbell* for repudiating its own dicta in *Sony* and *Harper & Row* and for retreating from any prior suggestions that a commercial use gives rise to a presumption or has a dispositive significance in the fair use analysis.[72] These commentators may be correct in concluding that the *Campbell* opinion will restore the common law traditions behind the copyright law and the fair use doctrine. However, they have overlooked other dicta in the *Campbell* opinion that may have a far greater impact on the law of copyright.

The additional dicta is the Court's suggestion in footnote ten that a balancing test be applied when a court considers the proper remedy for a copyright infringement and that the balancing test may include the public's interest in the original work.[73] In footnote ten the Court invited future courts "to bear in mind that the goals of the copyright law, 'to stimulate the creation and publication of edifying matter,' are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use."[74]

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66. *Campbell*, 972 F.2d at 1437.

67. 471 U.S. 539, 566 (1985).

68. *Campbell*, 972 F.2d at 1439.

69. *Id.*

70. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1173-75 (1994).

71. *Id.* at 1174.

72. *See* Howard J. Schwartz & Cynthia D. Richardson, *2 Live Crew Case Sets 'Fair Use' Back on Track*, N.J.L.J., July 25, 1994, at S12; Henry R. Kaufman & Michael K. Cantwell, *From A First Amendment Standpoint, The 2 Live Crew Case Added 'Breathing Space' Into The Copyright Mix*, NAT'L L.J., May 16, 1994, at A7; Joseph Mauro, *'Pretty Woman' Packs A Punch*, N.Y.L.J., April 29, 1994, at 7.

73. *Campbell*, 114 S. Ct. at 1171 n.10.

74. *Id.*

The Court cited Judge Pierre N. Leval,[75] who had stated that where "there may be a strong public interest in the publication of the secondary work," a court may wish to protect the copyright owner's interest by awarding damages rather than issuing an injunction.[76] The Court buttressed its assertion in noting the position taken by the Ninth Circuit in *Abend v. MCA, Inc.*,[77] that an injunction should not issue when "special circumstances" may cause "great injustice" to defendants and "public inquiry."[78]

The *Campbell* decision was the first time the Supreme Court supported the proposition that an injunction should not automatically issue whenever an infringement is likely to continue, and is a tremendous departure from the traditional approach of automatically issuing injunctions against future copyright infringements.[79] The proposition is particularly interesting because the Court did not define the proper scope of the public's interest nor did it determine what "special circumstances" will allow an infringing user to pay damages and continue the infringement. The remainder of this Note will explore these issues.

## III. THE INTERPRETATION OF FOOTNOTE TEN

This Note addresses three possible interpretations of footnote ten in the *Campbell* opinion. One interpretation is based on the First Amendment, and is founded on the notion that the public's interest in a work, regardless of the underlying motivation for the creation of the original work and its published or unpublished nature, should be considered when fashioning a remedy for an infringement.[80] Proponents of this theory argue that the "special circumstances" for withholding an injunction are met whenever there is a high degree of public interest in the information conveyed.[81]

A second approach was set forth by Judge Pierre N. Leval in his *Harvard Law Review* article, *Toward A Fair Use Standard.*[82] Judge Leval's interpretation is also founded on the notion that the public's interest is relevant to the selection of

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75. Judge Leval currently presides over the United States District Court for the Southern District of New York.

76. Leval, *supra* note 17, at 1132.

77. 863 F.2d 1465, 1479 (9th Cir. 1988).

78. *Campbell*, 114 S. Ct. at 1171 n.10.

79. *See, e.g.*, New Era Publications Int'l v. Henry Holt, Co., 884 F.2d 659, 662 (2d Cir. 1989) (holding that "the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use"); Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987) ("If [an author] copies more than minimal amounts of . . . expressive content, he deserves to be enjoined.").

80. *See generally*, Paul Goldstein, *Copyright and The First Amendment*, 70 COLUM. L. REV. 983 (1970) (assessing the extent to which a copyright's statutory and enterprise monopolies infringe upon the First Amendment).

81. *Id.* at 990.

82. Leval, *supra* note 17, at 1132.

the proper remedy.[83] Judge Leval, however, places factual restrictions on his approach and would deny an injunction in only those circumstances where there is a great public interest in the original work and the original work was created for purely private purposes.[84]

A third interpretation withholds an injunction in only those cases which have factual scenarios that closely parallel the prerequisites for invoking one of the compulsory licenses set forth in the Copyright Act.[85] This is the most restrictive approach and the key to understanding this interpretation of footnote ten is to understand why Congress created the compulsory licenses.

### *A. The First Interpretation—Unbounded Public Interest*

In light of the policy supporting copyright law and the fair use doctrine, should the degree of the public's interest in an infringing work determine the type of remedy a court should order for an infringement? More specifically, should a court withhold an injunction when there is great public interest in an infringing work, regardless of the creative motivation and the published or unpublished status of the original work? In order to answer these questions, it will be helpful to explore the debate surrounding the coexistence of the copyright law and the First Amendment. Also, it will be beneficial to examine the Supreme Court's reaction to an earlier proposition that the public's interest in a work should be considered when determining fair use.[86]

*1. Copyright's First Amendment Infringement.*—Given the broad language in section 107 of the Copyright Act, several commentators and courts have entertained the question of whether the public's right to receive information plays a role in the law of copyright.[87] This debate was largely fueled by the apparent clash of the monopoly power granted to a copyright owner[88] and the free speech guaranteed by the First Amendment.[89] The fundamental rationale of the First

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83. *Id.*

84. *Id.*

85. *See* 17 U.S.C. § 115 (1994). This section allows a secondary user to pay a statutorily determined fee and obtain a compulsory license to record his version of a nondramatic musical work when: (1) the original work has been distributed to the public under the authority of the copyright owner; (2) the primary purpose of the secondary user in making the recordings is to distribute them to the public for private use; and (3) the secondary user only changes the original work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but does not change the basic melody or fundamental character of the original work.

86. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-56 (1985).

87. *See* Salinger v. Random House, Inc., 811 F.2d 90 (1987); *Harper & Row*, 471 U.S. at 539; *see also* Floyd Abrams, *First Amendment and Copyright,* 35 J. COPYRIGHT SOC. 1, 12 (1987); Goldstein, *supra* note 80, at 983.

88. 17 U.S.C. § 106 (1994) (giving the copyright owner exclusive rights to his works).

89. The amendment states that "[c]ongress shall make no law . . . abridging the freedom of speech, or the press . . . ." U. S. CONST. amend. I.

Amendment was stated by Justice Brandeis in the following passage:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[90]

The First Amendment is central to preserving a democratic society.[91] An important prerequisite "in a society of free choice is that its members be broadly educated in the ideas that affect their political decisions."[92] However, political choices are not only the result of exposure to political ideas. Cultural experiences such as philosophy, science, and the written, visual, and musical arts are also important.[93] This same general principle was recognized by the judiciary and reduced to three judicial rules of thumb in modern constitutional decisions. First, the "assertion that the first amendment was intended to define not an individual's right to speak, but, rather, a community right to hear."[94] Second, "this right to hear, while ultimately justified by reasons of political fluency, extends to artistic as well as political expression."[95] Third, and connected to the second, "the fact that the motive for an expression is commercial rather than political does not exclude it from First Amendment protection."[96]

The latter two rules are concerned with works "typically subject to the copyright monopoly. Copyrighted works are usually artistic rather than political,

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90. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

91. Goldstein, *supra* note 80, at 988.

92. *Id.*

93. *Id.*

94. *Id. See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) (Black, J., concurring and dissenting); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); Roth v. United States, 354 U.S. 476, 484 (1957); Stromberg v. California, 283 U.S. 359, 369 (1931).

95. Goldstein, *supra* note 80, at 989. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 13 (1965).

96. Goldstein, *supra* note 80, at 989. *See, e.g., Time*, 385 U.S. at 396-97; Ginzburg v. United States, 383 U.S. 463, 474 (1966). *But cf.* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (explaining that "the Constitution imposes no such restraint on government [regulation] as [it] respects purely commercial advertising").

and their motive is commonly economic."[97] To the extent that copyrighted material falls within the reach of the First Amendment's protection, copyright's monopoly will inevitably conflict with the community's right to hear. Inherent in the copyright owner's monopoly power is the right to withhold his expression from the public. The original owner's right to limit the size of the audience to which the work is distributed restricts the public's right to hear, read, and view the copyrighted material.

Based upon the above analysis, the government's grant of copyright monopolies tends to abridge the public's right to information.[98] However, copyright can also be viewed as advancing this right. The First Amendment has historically been used to destroy barriers that may prevent a malleable and revolutionary public from having access to new political speech and information about its elected government.[99] The only stimulus required to induce political speech is an audience capable of political action. In contrast, the rewards of artistic expression are economic;[100] the artist seeks money rather than votes. By providing the economic incentive for the production of artistic creations, copyright theoretically assures that the information distributed to the public will also include that which is motivated by profit.

If the right to hear and the underlying theory of the First Amendment were taken to their furthest extent, the public could demand access to nonpolitical, creative works with little or no compensation being paid to the original author or creator. This full measure of the public's interest—free participation in all forms of expression—would require that the artist be denied copyright protection and the right to exclude. This withdrawal of copyright protection would reduce the incentives for creation and would be accompanied by a decline in the dissemination of needed expressions, thoughts and ideas.

*2. Harper & Row.*—The apparent tension between copyright law and the First Amendment was largely resolved by the Supreme Court in the seminal case *Harper & Row, Publishers, Inc. v. Nation Enterprises.*[101] In *Harper & Row*, the Court sought to determine if the unauthorized use of quotations from President Gerald R. Ford's unpublished manuscript was a "fair use" under section 107 of the Copyright Act of 1976.[102] In March, 1979, an undisclosed source provided Nation Enterprises with the unpublished manuscript of President Ford's autobiography, *A Time to Heal: The Autobiography of Gerald R. Ford.*[103] Working directly from the manuscript, a Nation editor produced a short piece entitled *The Ford*

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97. Goldstein, *supra* note 80, at 989.

98. Thomas I. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L. J. 877, 918 (1963).

99. Goldstein, *supra* note 80, at 989.

100. Zechariah Chafee, Jr., *Reflections on The Law of Copyright: I,* 45 COLUM. L. REV. 503, 506-08 (1945).

101. 471 U.S. 539 (1985).

102. *Id.* at 541-42.

103. *Id.* at 542.

*Memoirs—Behind the Nixon Pardon*.[104] The work was timed to "scoop" an article scheduled to appear in *Time* magazine. Time had agreed to purchase from Harper & Row the exclusive right to print prepublication excerpts of *A Time to Heal*, but as a result of Nation's article, Time canceled its agreement with Harper & Row.[105] Harper & Row then brought a successful copyright action against Nation Enterprises. On appeal, however, the Second Circuit reversed the lower court's finding of infringement, explaining that Nation's act was sanctioned as a "fair use" of the copyrighted material.[106] The Supreme Court granted certiorari.[107]

A principal argument set forth by Nation on appeal was that the First Amendment widened the scope of fair use when the information conveyed related to matters of "high public concern."[108] Nation argued that the "substantial public import of the subject matter of the Ford memoirs [was] grounds for excusing a use that would ordinarily not pass muster as a fair use."[109] Nation, therefore, set forth the notion "that the public's interest in learning . . . news . . . outweighs the right of the author to control its first publication."[110]

The Supreme Court did not find this reasoning persuasive. The Court noted that copyright's idea and expression dichotomy "'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'"[111] The Court observed that "'the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.'"[112] Notwithstanding the lack of protection copyright offers to facts contained in a work, the Court ensured that those who write and publish factual narratives, such as *A Time to Heal*, would "at least enjoy the right to market the original expression contained therein as just compensation for their investment."[113]

The Court explained that Nation's theory of expanding fair use would effectively destroy any expectation of copyright protection in a work of a public figure and would leave little incentive to create such memoirs.[114] This in turn would deny the public an important source of significant historical information.[115] The Court then warned that in society's "haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free

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104. *Id.*

105. *Id.*

106. Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 208 (2d Cir. 1983).

107. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

108. *Id.* at 555-56.

109. *Id.* at 556.

110. *Id.*

111. *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1984)).

112. *Id.* (quoting International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918)).

113. *Id.* at 557.

114. *Id.*

115. *Id.*

expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[116]

The Court concluded that it is "fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike."[117] "'[T]o propose that fair use be imposed whenever the "social value [of dissemination] . . . outweighs any detriment to the artist," would be to propose depriving copyright owners of their right in property precisely when they encounter those users who could afford to pay for it.'"[118] As one commentator noted: "If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public would have nothing worth reading."[119]

*3. The Public's Interest and The Appropriate Remedy.*—Since the *Harper & Row* decision, First Amendment lawyers and commentators have argued that the public's interest in a work should still be an important consideration when determining the appropriate remedy for an infringement.[120] However, both the policy behind the copyright law and the practical effect of considering the public's interest at the remedial stage renders this suggestion inappropriate. An example will show how the same reasoning used in *Harper & Row*, which rejected the proposal that the public's interest should play a role in the fair use determination, can be used to reject the notion that the public's interest in a work should be considered when choosing the appropriate remedy for an infringement.

Suppose a plaintiff is a gifted photographer who, through a combination of diligence and skill, manages again and again to take captivating photographs of cataclysmic or historic occurrences which are of insurmountable public interest. Also, suppose that because of the great public interest in the plaintiff's photographs, several newspapers, news magazines and television networks infringe upon the photographer's copyright by republishing and broadcasting his photos without payment and without regard to whether the photographer had an opportunity for first publication.[121] Under the theory that the public's interest should bear upon the type of remedy, regardless of the motivation for creation or the published or unpublished status of the original work, an injunction against the infringement in the above hypothetical would be disfavored.

Proponents of this theory would interpret the word "may" in section 502 of the Copyright Act as allowing a court to choose between enjoining the infringers or

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116. *Id.* at 558.

117. *Id.*

118. *Id.* (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

119. Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43, 78 (1971).

120. *See, e.g.*, James A. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 994-96 (1990).

121. Leval, *supra* note 17, at 1131 n.114.

limiting the plaintiff to damages.[122] If a court chose not to issue an injunction, the plaintiff would then look to section 504 of the Copyright Act for his remedy.[123] Section 504(b) of the Copyright Act provides that "[t]he copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[124]

Under this section, the plaintiff—the photographer in the above example—should be entitled to receive all the profits from the newspapers, magazines, and networks for their infringements. Proponents of this theory, however, would not support this outcome because awarding the plaintiff all profits from the infringing use would have the same effect as an injunction. The infringing users would no longer profit from the use and would discontinue the infringement. This would have the effect of decreasing or completely halting the dissemination of the photographs, which was the very thing the proponents of this theory wished to avoid. Instead, the proponents of this theory would interpret section 504 of the Copyright Act as allowing the public's interest in the photographs to decrease the compensation awarded the photographer to a level that would allow the infringement to remain profitable, yet provide the photographer with some compensation.[125]

Awarding the plaintiff-photographer a remedy and allowing the infringement to continue may appear fair and in compliance with the congressional suggestion that the fair use doctrine "is an equitable rule of reason."[126] However, the long-term effect of awarding such a remedy and allowing the infringement to continue may not comply with the constitutional mandate of "promoting the Progress of Science and the useful Arts."[127] For example, what will the photographer do the

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122. The statute states that "[a]ny court . . . *may* . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502 (1994) (emphasis added). In a recent copyright infringement case the Supreme Court interpreted the word "may" in section 505 of the Copyright Act as "clearly connot[ing] discretion." Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 (1994). The full text of section 505 reads as follows:

> In any civil action under this title, the court in its discretion *may* allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court *may* also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505 (emphasis added).

123. 17 U.S.C. § 504.

124. 17 U.S.C. § 504(b).

125. Interpreting the statute in this manner would be difficult because, unlike section 502, section 504(b) does not contain discretionary language that would allow a court to reduce the copyright owner's actual damages and profits. *Id.* Instead, the language in section 504(b) "entitles" the copyright owner to the actual damages suffered by him and any profits of the infringer. *Id.*

126. H.R. REP. No. 1476, 94th Cong., 1st Sess. 65 (1975), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

127. U.S. CONST. art. I, § 8, cl. 8.

next time he is presented with an opportunity to take another captivating photograph? If courts allow newspapers, magazines, and networks to infringe upon the copyright of his photographs and pay only a judicially determined fee, which may have been far below market value in order to ensure that the infringing use would remain profitable, he may hesitate to raise his camera.[128] The photographer would soon realize that the more successful he becomes in capturing photographs of great public interest the better defense secondary users would have for infringing upon his copyright. At some point, the photographer would generate such a high degree of public interest in his photographs that an infringing, secondary user would be able to copy and distribute his photographs and pay little or nothing in damages.

Such a case is no different from that presented to the Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*[129] where the infringers argued that a high degree of public interest in a work should allow them to make a fair use of the original work without compensating the original creator.[130] In *Harper & Row*, the Court explained that to allow such an outcome would "effectively destroy any expectation of copyright protection" and would leave little incentive to create such works.[131] Here again, to allow a high degree of public interest in a work to reduce the amount of compensation awarded to the gifted photographer would "effectively destroy any expectation of copyright protection" and would reduce or eliminate the incentives[132] for taking photographs of public interest.

To avoid future appropriation of his work, a photographer would not strive to take compelling photographs and the public would soon have few photographs worthy of interest and would be denied those photographs which could best advance the progress of science and useful arts.[133] Given this result, the approach that the public's interest should be considered when fashioning a remedy for an infringement, regardless of the underlying motivation for creation or the publication status of the original work, must be regarded as an inappropriate interpretation of the *Campbell* opinion's footnote ten.

### *B. The Second Interpretation—Judge Leval's "Purely Private" Approach*

*1. The Public's Interest and Purely Private Works.*—A second possible interpretation of footnote ten[134] comes from Judge Pierre N. Leval. Like the first approach, his theory is founded on the notion that the public's interest is relevant

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128. Another problem with a judicially determined fee is that the judiciary is not always aware of the many different markets and market prices for copyrighted material. A proper market price requires a great deal of economic analysis and market study; even then reasonable minds will differ.

129. 471 U.S. 539 (1985).

130. *Id.* at 556.

131. *Id.* at 557.

132. *Id.*

133. U.S. CONST. art. I, § 8, cl. 8.

134. *See supra* notes 1-4 and accompanying text.

to the selection of a proper remedy.[135] However, Judge Leval limits the application of his approach to narrowly defined circumstances. Unlike the first approach, which its proponents would apply in all fair use cases regardless of the creative motivation for the original work or its publication status,[136] Judge Leval would apply his approach in only those instances where the original work was created "for purely private purposes and not as a work . . . for the public benefit."[137] By considering the public's interest in a work in only those cases where the work is created for purely private reasons, he professes to eliminate the flaws of the first approach as revealed in the above hypothetical.[138]

Judge Leval reasons that when a work is created for public dissemination and monetary gain, the refusal to issue an injunction against future infringements reduces the original author's compensation, diminishes the incentive to create, and does not comport with the underlying policy of copyright.[139] On the other hand, Judge Leval reasons that in cases where the original work was created for "purely private reasons" the original author has no expectation of monetary gain and allowing a secondary user to infringe upon the copyright of the original work does not reduce the incentive to create future works for purely private purposes.[140]

Judge Leval is mistaken. The practical effect of allowing secondary users to make an unfair use of private works can reduce the incentive to create such works and does not "promote the Progress of Science and the useful Arts."[141] In order to reveal the weaknesses in Judge Leval's theory, it will be necessary to explore the facts of the case that motivated Judge Leval to adopt his position: *Salinger v. Random House, Inc.*[142] This Note will then apply Judge Leval's proposal to the facts of *Salinger* and explore the ramifications.

*2. Salinger v. Random House, Inc.*—*Salinger* involved the highly regarded American novelist J.D. Salinger, best known for his novel *The Catcher in the Rye*. The defendants were Ian Hamilton, a well-respected writer on literary topics, and his publisher, Random House.[143] In July, 1983, Hamilton informed Salinger that he was undertaking a biography of Salinger and sought Salinger's cooperation.[144] Salinger refused, informing Hamilton that he preferred not to have the biography written during his lifetime.[145] Hamilton nevertheless proceeded and spent the next three years preparing a biography titled, *J.D. Salinger: A Writing Life*.[146] Several unpublished letters written by Salinger between 1939 and 1961 were an important

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135. Leval, *supra* note 17, at 1134.
136. *See supra* notes 120-122 and accompanying text.
137. Leval, *supra* note 17, at 1134.
138. *Id.*
139. *Id.*
140. *Id.*
141. U.S. CONST. art. I, § 8, cl. 8.
142. 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1986).
143. Salinger v. Random House, Inc., 811 F.2d 90, 92 (2d Cir. 1986).
144. *Id.*
145. *Id.*
146. *Id.*

source of research material for the biography.[147] Most were written to his close friends and business associates.[148] Hamilton located several, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas where they had been deposited by their recipients.[149] Prior to examining the letters at the libraries, Hamilton signed agreements restricting the use he could make of the letters without permission from the owner of the copyright.[150]

After Hamilton finished the first version of the biography, Salinger was provided a set of the biography proofs.[151] After reviewing the proofs, Salinger objected to the publication of the biography until all of his unpublished materials were deleted.[152] In response, Hamilton and Random House revised the initial draft of the biography.[153] Much of the material previously quoted from the Salinger letters was replaced with close paraphrasing.[154] However, more than 200 quoted words remained. Salinger then filed suit seeking both an injunction to prohibit future publication of the biography and damages.[155]

Judge Leval, in his district court opinion, held in favor of Hamilton.[156] The circuit court reversed,[157] finding that Hamilton had copied too much of Salinger's expressive material.[158] Further, the court rejected the notion that denying Hamilton the opportunity to copy the expressive content would interfere with the process of enhancing public knowledge.[159] The Second Circuit held that Hamilton could copy the facts contained in the letters but not the expressive content, regardless of the public's interest.[160]

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147. *Id.*

148. *Id.*

149. *Id.* The general rule concerning copyright ownership of a letter is that although the author of a letter sends the document to another, the author retains the copyright in the expressive content of the letter. 1 NIMMER & NIMMER, *supra* note 13, § 5.04. The author is therefore entitled to prevent the letter's copying or publication. The recipient of the letter becomes the owner of the ink and paper or other physical materials of which the letter consists. *Id.* The recipient has the right to permit a limited number of people to inspect the letter, to transfer possession of the document to another, or to simply destroy it. *Id.* The recipient may also permit the letter to be displayed by a library. Exceptions to these general principles apply when the author intends to convey the copyright to the recipient or dedicate such right to the public, when the recipient's publication of the letter is necessary to protect his or another's rights or character, and when the letter is written by a public official to a governmental body. *Id.*

150. *Salinger*, 811 F.2d at 93.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Salinger v. Random House, Inc., 650 F. Supp. 413, 428 (S.D.N.Y. 1986).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Unable to reconcile the Second Circuit's finding of infringement with the great public interest in having access to Hamilton's unedited work, Judge Leval used the facts of *Salinger* to create a narrow exception to the general rule that with infringement comes injunction.[161] In his *Harvard Law Review* article, Judge Leval explained that the facts of *Salinger* were worlds apart from cases of "simple piracy" in which the infringer incurs "no development cost, no advertising expense, and little risk." In cases of "simple piracy" the infringer takes a "free-ride on the copyright owners publicity . . . and deprive[s] the copyright owner of the rewards of his creation."[162] Judge Leval then narrowly defined the circumstances of when a court should refrain from issuing an injunction against an infringement by looking to the original author's intent or interest in the work.[163] When the original author created a work with a "view toward publication," Judge Leval would have a court grant an injunction against a future infringement.[164] However, in cases where the original work was created for "purely private purposes," Judge Leval would have a court refrain from issuing an injunction, allow the infringement to continue, and limit the original author's remedies to monetary damages.[165]

*3. Problems With Judge Leval's "Purely Private" Proposal.*—Like the first theory, Judge Leval's approach may appear equitable because it allows for both the dissemination of the work and the compensation of the original creator. However, like the first approach, the long-term effects of Judge Leval's interpretation may harm both the copyright owner and the public. For example, suppose the Second Circuit had applied Judge Leval's theory to the facts of *Salinger*.[166] If so, the court would have allowed Hamilton to continue the infringing use and would have provided Salinger with any provable damages, which would have likely been nominal because the original work was not created with an eye toward publication.[167] Next, suppose that the day after the court rendered judgment, Salinger is asked by his relatives to compile a list of all the family traditions he can remember and give the private list to members of his family so that future generations could carry on the traditions. No doubt, Salinger may hesitate to compile the list. He may fear that the list would one day be obtained by an opportunistic writer who would reproduce the list knowing that there would be a great public interest in learning about the Salinger family traditions, as described by J.D. Salinger. Given this result, the continuance of the Salinger family traditions would be relegated to the chance of memory.

In addition to the harm suffered by Salinger and his family, the public may

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161. *See supra* note 1 and accompanying text.

162. Leval, *supra* note 17, at 1132.

163. *Id.*

164. *Id.* at 1133.

165. *Id.* at 1133-34.

166. 811 F.2d 90 (2d Cir. 1986).

167. *Id.* at 93. Under section 505 of the Copyright Act, Salinger may also receive attorney fees; however, he would only be recouping what he had already paid and would not be receiving the full benefits from his work. 17 U.S.C. § 505 (1994).

suffer as well. For example, suppose that if not for the hypothetical holding of the Second Circuit, which allowed Hamilton's infringement to continue, Salinger would have compiled the list of family traditions and voluntarily deposited it in the Harvard, Princeton, and University of Texas libraries. Instead, fearful that secondary users would infringe upon the copyright of his work, Salinger's refusal to compile the list and make the contribution would deny the public access to a work of great public interest. Other writers and contributors of works may also follow Salinger's lead and withhold information and withdraw works already deposited in those and other public libraries. Given this result, the very institutions which are to be the centers for research and the depositories of knowledge would be boycotted by those most able to make worthwhile contributions. As a consequence, all of society would be denied access to works of great public interest and would suffer because of the actions of an infringing secondary user and the holding of an ill-informed court.

Another problem with Judge Leval's theory is that it allows the judiciary to determine the appropriate licensing fee. In most cases, economist and market analysts can testify about market conditions and help establish an appropriate fee. However, when the original work was created for purely private purposes there is no market to analyze, and the expert testimony will largely be based on subjective factors. Without an existing market price as a guide, it is unlikely that judges and jurors will be able to fashion an appropriate licensing fee that comports with the underlying purpose of the copyright law.

This Note is not suggesting that copyright law should be structured to protect the narrow interest of an individual obsessed with privacy[168] or allow authors to censor the use of their works. Secondary users should be free to make a fair use of private works that are legally obtained. Judge Leval's proposal is disturbing because it provides private works less protection under the copyright law than works which are created with an eye toward publication. Judge Leval's proposal allows a secondary user to go beyond fair use and infringe upon the copyright of private works.[169] He attempts to compensate for the infringement by providing the copyright owner with monetary damages.[170] This, however, is an illogical remedy because the original author's incentive to create the private work was not based on monetary gain. Instead, the original author created the private work in order to communicate with others.

One could argue that private works should receive less protection under the copyright law because the incentive to create private works will always exist regardless of infringements. However, if an author is concerned about the infringement of her private works, "she will be less likely to present her thoughts

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168. Other areas of the law protect the right to privacy. *See, e.g.*, 16A AM. JUR. 2D *Constitutional Law* § 504 (1979). "[T]he First Amendment does not guarantee to the press a constitutional right of special access to information or places not available to the general public, nor does the right to speak and publish carry with it the unrestrained right to gather information." *Id.*

169. *See* Leval, *supra* note 17, at 1131-32.

170. *Id.* at 1132.

in tangible form;[171] she may edit the expression of her ideas more scrupulously or she may be inhibited in the creation of her works."[172] She will also be discouraged from donating her works to libraries and institutions of higher learning.

Allowing a court to refrain from issuing an injunction against infringement, when the original work is created for purely private purposes, does not advance the underlying philosophy of copyright law[173] and may impede the transfer of knowledge. Judge Leval's proposal, like the first approach, does not always comply with the constitutional mandate of promoting the progress of science and the useful arts and is not the proper interpretation of the *Campbell* opinion's footnote ten.[174]

### *C. The Third Theory—The "Compulsory License" Approach*

*1. The Compulsory Licenses.*—A compulsory license allows a secondary user to use an original work by simply paying a statutorily controlled price.[175] Compulsory licenses reflect the conclusion that in certain narrowly defined circumstances, the public's interest in having access to a work outweighs the creator's interest in appropriating the pure market value of the work.[176] Specifically, Congress concluded that a compulsory license would not reduce creative incentives to a point where authors would decline to create and publishers would decline to produce desired works in desired numbers.[177]

Section 115(a) defines the availability and scope of compulsory licenses for nondramatic musical works.[178] It states that "[w]hen phonorecords of a nondramatic musical work have been distributed to the public . . . under the authority of the copyright owner, any other person may . . . obtain a compulsory license to make and distribute phonorecords of the work."[179] However, until

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171. Teresa De Turris, *Copyright Protection of Privacy Interests in Unpublished Works,* 1994 ANN. SURV. AM. L. 277, 287. *See also* Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law,* 43 U. MIAMI L. REV. 233, 272 (1988) (explaining that one of the underlying rationales of the *Harper & Row* decision is that "special protection of unpublished works [would] . . . promote full gestation of [an author's] creative effort [and] foster artistic integrity").

172. De Turris, *supra* note 171, at 287.

173. *See* U.S. CONST. art. I, § 8, cl. 8.

174. 114 S. Ct. 1164, 1171 n.10 (1994).

175. *Id.*

176. 1 PAUL GOLDSTEIN, COPYRIGHT § 1.2.3.1, at 17 (1989).

177. *Id.*

178. 17 U.S.C. § 115(a) (1994). For the purposes of this Note, section 115 will serve as a fair representation of all the compulsory licenses. Other compulsory licenses include the compulsory license for secondary transmissions by cable systems and the compulsory license for coin-operated phonorecord players. 17 U.S.C. §§ 111(d), 116.

179. 17 U.S.C. § 115(a)(1). This section does not allow the secondary user to make and distribute copies and phonorecords of the original work. It only allows the secondary user to record their *own version* of the original nondramatic, musical work and distribute their version of the original work. *See* 2 NIMMER & NIMMER, *supra* note 13, § 8.04[A].

copyright owners distribute their works to the public their rights remain exclusive and they cannot be forced to reveal their work in the name of the public interest.

Section 115 also restricts the nature of the rights granted under the compulsory license.[180] For example, under section 115, the compulsory licensee does not obtain the right to reproduce transformative derivatives of the original musical work, such as sheet music or public performances.[181] Instead, the section 115 compulsory licensee is accorded only a limited adaptation right in connection with his recording of the licensed musical work.[182] He may make a musical arrangement of the work "to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work."[183] Therefore, Congress has concluded that the requirements for obtaining a compulsory license under section 115, combined with the limited rights granted to the licensee, and the compulsory licensing fee protect the creative incentives of the copyright owner to the extent that the copyright owner will still create nondramatic musical works even if subject to a compulsory license.

Section 115 also outlines the procedures for accounting and payment of the compulsory licensing fees to the copyright owner of record in the Copyright Office.[184] The licensing fees are determined by the Copyright Arbitration Royalty Panels (CARPs).[185] However, in practice, the compulsory license provisions are rarely invoked by the major record companies because they would like to avoid the burden of monthly or annual statements and payments. Instead, an important role is played by the Harry Fox Agency, Inc., a wholly owned subsidiary of the National Music Publishers Association.[186] Almost all the major music publishing firms in the United States have authorized the Harry Fox Agency to issue licenses to record companies for the manufacture of phonorecords of their musical compositions.[187] The license is issued at a royalty equal to the prevailing statutory rate and requires accounting and payment schedules less onerous than those of the

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180. 17 U.S.C. § 115(a)(2).

181. *Id.*; *see also* 2 NIMMER & NIMMER, *supra* note 13, § 8.04[B].

182. 2 NIMMER & NIMMER, *supra* note 13, § 8.04[F].

183. 17 U.S.C. § 115(a)(2).

184. *Id.* § 115(c)(1).

185. *Id.* § 801(b)(1). The now defunct Copyright Royalty Tribunal was a major and controversial creation of the 1976 Act. It was an independent agency functioning within the legislative branch of the government, and was set up to administer compulsory copyright licenses. The Copyright Royalty Tribunal served two functions. The first was to set the statutory royalty rates for the compulsory licenses. The second was to settle disputes concerning the distribution of monies collected for cable television and jukebox performances. In 1993 Congress abolished the Copyright Royalty Tribunal, replacing it with Copyright Arbitration Royalty Panels to be convened, as the need arises, by the Librarian of Congress with the recommendation of the Register of Copyrights. MARSHAL LEAFFER, UNDERSTANDING COPYRIGHT LAW 223-25 (2d ed. 1995).

186. SHELDON W. HALPERN ET AL., COPYRIGHT CASES AND MATERIALS 212 (1992).

187. *Id.*

statute.[188] The record companies are also free to negotiate directly with the copyright owner in an attempt to get a license at a lower rate.[189]

With this background, a third possible interpretation of footnote ten in the *Campbell* opinion[190] is the "compulsory license" approach. This approach does not enjoin infringements in cases that have factual scenarios which closely parallel the prerequisites for normally invoking one of copyright's compulsory licenses.[191] Instead, this approach allows an infringing user to pay a fee and continue to infringe upon the copyright of the original work. The "compulsory license" approach can be distinguished from the two previously discussed interpretations in two ways. First, the "compulsory license" approach requires the copyright owner to voluntarily distribute his or her work to the public before it can be invoked. Both the first and second approaches allowed for the continued infringement of works that had not been published or were never intended to be published. Second, the "compulsory license" approach requires the existence of an organization or agency that has already determined an appropriate licensing fee for the continued infringement of the original work. Under both the first and second approaches, the judiciary was required to determine the appropriate fee and this created a risk that the fee would be set far below the proper market price.

*2. American Geophysical Union v. Texaco, Inc.*—The "compulsory license" approach to interpreting footnote ten of the *Campbell* opinion recently found support in *American Geophysical Union v. Texaco, Inc.*[192] In *Texaco*, the American Geophysical Union and 82 other publishers of scientific and technical journals brought a class action suit against Texaco claiming that Texaco's unauthorized photocopying of articles from their journals constituted copyright infringement.[193] Among other defenses, Texaco claimed that its copying was a fair use under section 107 of the Copyright Act.[194] The actions which gave rise to the suit focused on Dr. Donald H. Chickering, II, a scientist at one of Texaco's research centers.[195]

As part of its substantial expenditures to support research activities, Texaco subscribed to many scientific and technical journals and maintained a sizable library of these materials.[196] In order to keep abreast of developments in his field, Dr. Chickering would review works published in various scientific and technical journals related to his area of research.[197] Texaco assisted him by having the company library circulate current issues of relevant journals to Dr. Chickering

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188. *Id.*

189. *Id.*

190. *See supra* notes 1-4 and accompanying text.

191. *See, e.g.*, 17 U.S.C. § 115 (1994) (compulsory license for making and distributing phonorecords).

192. 37 F.3d 881 (2d Cir. 1994).

193. *Id.* at 883.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 884.

when he placed his name on the appropriate routing list.[198] When he received the various publications, Dr. Chickering would photocopy any material or data from them which he felt would facilitate his current or future research, and would then place the copies in his files for future reference.[199] American Geophysical Union claimed that this copying constituted copyright infringement.[200]

The district court considered the statutory fair use factors identified in section 107,[201] weighed other equitable considerations, and held that Dr. Chickering's photocopying of the articles did not constitute fair use.[202] The Second Circuit affirmed the district court's finding of infringement.[203] The Second Circuit concluded that the first factor, "the purpose and character of the use,"[204] favored the publishers because the "dominant purpose of the use [was] 'archival'--to assemble a set of papers for future reference, thereby serving the same purpose for which additional subscriptions are normally sold, or . . . for which photocopying licenses may be obtained."[205] The court held that the second factor, "the nature of the copyrighted work,"[206] favored Texaco because of the "predominately factual nature of [the articles]."[207] The third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole,"[208] weighed in favor of the publishers because Texaco had copied entire articles and "each article constituted an entire work in the fair use analysis."[209] Under the fourth factor, "the effect of the use upon the potential work,"[210] the Second Circuit held that, in addition to the sale of additional journal subscriptions, Texaco's copying was reducing the publishers' markets for the sale of individual journal articles.[211]

The court concluded that "the publishers . . . [had] created, primarily through the CCC [Copyright Clearance Center],[212] a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying."[213] The court concluded "that three of the four statutory factors, including the important first and fourth factors, favored the publishers" and agreed

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198. *Id.*
199. *Id.*
200. *Id.* at 883.
201. 17 U.S.C. § 107 (1994).
202. American Geophysical Union v. Texaco Inc., 802 F. Supp. 1 (S.D.N.Y. 1992).
203. American Geophysical Union v. Texaco Inc., 37 F.3d 881 (2d Cir. 1994).
204. 17 U.S.C. § 107(1).
205. *Texaco*, 37 F.3d at 892-93.
206. 17 U.S.C. § 107(2).
207. *Texaco*, 37 F.3d at 893.
208. 17 U.S.C. § 107(3).
209. *Texaco*, 37 F.3d at 894.
210. 17 U.S.C. § 107(4).
211. *Texaco*, 37 F.3d at 898.
212. "The CCC is a central clearing-house established in 1977 primarily by publishers to license photocopying. The CCC offers a variety of licensing schemes; fees can be paid on a per copy basis or through blanket license arrangements." *Id.* at 897 n.16.
213. *Id.* at 898.

with the district court that Texaco's photocopying of the journal articles was not a fair use.[214] The Second Circuit then went beyond the issues before it and considered the publishers' remedies.[215] The court explained "that the context of this dispute appears to make ill-advised an injunction," and the dispute "appears to be an appropriate case for exploration of the possibility of a court-imposed compulsory license."[216] The court cited footnote ten of the *Campbell* opinion to support this suggestion.[217]

*3. The "Compulsory License" Approach Appears to Comply.*—The factual similarity between the *Texaco* case and the requirements for invoking one of copyright's compulsory licenses was most likely the reason that the Second Circuit recommended withholding an injunction notwithstanding Texaco's infringement.[218] For example, the publishers in *Texaco* produced their journals with an eye toward publication and had voluntarily disseminated their journals for the purposes of exploiting the public's interest in the work,[219] thereby meeting the requirement in section 115 of the Copyright Act that the copyright owner of a nondramatic musical work voluntarily distribute it to the public before a compulsory license can be invoked.[220] Second, section 115 includes a built-in damage estimator in that a compulsory license is issued only after the original composer markets his work. In *Texaco*, the publishers had the opportunity of first publication,[221] and a court could avoid undercompensating them by basing the court-imposed licensing fee on a percentage of the cover price in proportion to the amount copied. Third, section 115 guards against the infringement of derivative works by allowing for only a limited transformation of the original work. The infringing use of the journals in *Texaco* did not transform them into derivative works. Instead, Texaco simply reproduced sections of the journals in their original form.[222] Finally, like the Copyright Arbitration Royalty Panels and the Harry Fox Agency, which oversee the regulation and payment of compulsory licenses for nondramatic musical works, the existence of the Copyright Clearance Center (CCC) in the *Texaco* case provided an efficient mechanism to oversee and license the photocopying of individual journal articles.[223]

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214. *Id.* at 899.

215. *Id.* at 899 n.19.

216. *Id.*

217. *Id.*

218. *See, e.g.*, 17 U.S.C. § 115 (1994) (compulsory license for making and distributing phonorecords).

219. *Texaco*, 37 F.3d at 883.

220. 17 U.S.C. § 115(a)(1).

221. *Texaco*, 37 F.3d at 883.

222. *Id.*

223. *Id.* at 897. Because few judges are familiar with the market for the direct sale and distribution of individual journal articles, organizations such as the CCC can help courts establish the proper rate for a judicially imposed compulsory license, provide judges with an independent, expert opinion on the appropriate rate for individual journal articles, and help a court avoid undercompensating the copyright owner.

Making the "compulsory license" approach contingent upon the original author's act of public dissemination ensures that the original author will have the right of first publication and avoids the problems of the first theory, which allowed for the use of all works of high public interest, regardless of the published or unpublished nature of the original.[224] This approach also avoids the pitfalls of Judge Leval's theory, which allows for the continued infringement of works created for purely private purposes, because it permits the continued infringement of only those works which were created with an eye toward publication.[225] Finally, the "compulsory license" approach ensures that the copyright owner will be properly compensated because the ill-equipped judiciary is not required to determine the appropriate licensing fee. Instead, this approach requires the preexistence of an organization or agency, such as the CCC or the Harry Fox Agency, which has already determined the appropriate licensing fee.

The "compulsory license" approach can succeed where the other two interpretations fail because it allows for an expedited dissemination of works while at the same time preserves the incentives for future creation. By accomplishing both of these tasks, the "compulsory license" approach more readily complies with the constitutional mandate of promoting science and the useful arts and is a more appropriate interpretation of footnote ten.

## CONCLUSION

This Note briefly reviewed the policies behind copyright law and the fair use doctrine and explored three possible interpretations of footnote ten in the *Campbell* opinion. The primary focus was to determine under what circumstances a court should refrain from issuing an injunction against infringement and award monetary damages. The first approach, which would deny an injunction whenever there was a high degree of public interest in a work regardless of the motivation for creation and the publication status of the work, would reduce creative incentives to produce future works and does not comport with the underlying policy of copyright law. The second approach, which would deny an injunction in only those cases where there was a high degree of public interest in the original work and the original work was created for purely private purposes, might chill the incentives for creating private works and to a greater extent, chill the frequency with which such works are donated to libraries. Given these ramifications, the second interpretation, like the first, fails to comport with the underlying policy of copyright law and is not a proper interpretation of footnote ten. The third interpretation of footnote ten allows a court to withhold an injunction against infringement and award monetary damages only in those cases that are factually similar to the requirements for invoking a compulsory license. By preserving creative incentives and allowing for the expedited dissemination of works, this approach more readily complies with the underlying philosophy of copyright law and therefore is the appropriate interpretation of footnote ten in the *Campbell*

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224. *See supra* notes 126-133 and accompanying text.

225. *See supra* 166-174 and accompanying text.

opinion.

The Supreme Court has not resolved the proper interpretation of footnote ten and future litigation will determine its proper meaning. Given the broad language of footnote ten, courts are likely to adopt several different interpretations. The task for future courts will be to determine when a licensing fee, as opposed to an injunction, is the appropriate remedy for an infringement. In doing so, two important aspects of the *Campbell* opinion should be considered: first, that footnote ten's proposition is dicta; and second, that the primary focus of the *Campbell* opinion was to reject the lower courts' elevation of the Supreme Court's dicta in the *Sony* and *Harper & Row* opinions. Thus, future courts should not inflate footnote ten to a per se rule that denies injunctions whenever there is a high degree of public interest in a work, but instead, they should apply the proposition in a manner that will comply with copyright's constitutional mandate of promoting the progress of science and useful arts.

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